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No. 75-608

[redacted]

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
SIXTH CIRCUIT

[redacted]

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Rules and Statutes Involved	3
Statement of the Case	5
Reasons for Granting this Writ	9
Conclusion	34
Appendix A	35
Appendix B	39
Appendix C	41
Appendix D	102
Appendix E	104
Appendix F	111
Appendix G	127

INDEX TO AUTHORITIES CITED

Cases

	Page
Adams v Walker, 492 F2d 1003 (7th Cir. 1974)	27
Arnett v Kennedy, 416 US 134 (1974)	25, 27
Baggett v Richardson, 473 F2d 863 (5th Cir. 1973)	33
Bloch v Bloch, 473 F2d 1067 (3d Cir. 1973)	33
Board of Regents v Roth, 408 US 564 (1972)	9, 12, 22, 24, 28
Caramico v Secretary of the Department of Housing & Urban Development, 509 F2d 694 (2d Cir. 1974)	20, 21
Hortonville Education Association v Hortonville Joint School District, 66 Wisc 2d 629, 225 NW2d 658, 88 LRRM 3075 (1974); cert granted 44 USLW 3200, October 6, 1975	12, 13, 28, 29
Indiana State Employee Assoc. Inc. v Boehning, 511 F2d 834 (7th Cir. 1975)	27
Inland Steel Co. v NLRB, 170 F2d 247 (7th Cir. 1948)	16
Lipp v Board of Education of the City of Chicago, 470 F2d 802, 805 (7th Cir. 1972)	28
Morrisey v Brewer, 408 US 471 (1972)	31
National Licorice Co. v NLRB, 309 US 350 (1940)	16
Perry v Sindermann, 408 US 593 (1972)	9, 18, 22, 24
Richardson v Communication Workers, 443 F2d 974, 978 (8th Cir. 1971)	15

BLEED THROUGH

Page

Rockwell v Crestwood School District, 393 Mich 616 (1975) 19, 27, 33, 34

1620 Corporation, Steslicki and Hotel Restaurant Employees, 1972 Mich Lab Op. 731..... 16

Soni v Board of Trustees, 513 F2d 374 (6th Cir. 1975) 18

T. A. Moynahan Prop., Inc. v Lancaster Village Corp., 496 F2d 1114 (7th Cir. 1974)..... 24

United States v State of Flordia, 482 F2d 205 (5th Cir. 1973) 33

Ward v Village of Monroeville, 409 US 57 (1972)... 31, 32

Young v United States, 498 F2d 1211 (5th Cir. 1974) 24

Constitutional Provisions, Rules and Statutes Involved

United States Constitution, Amendment 14, Section 1 & 5..... 3

42 USC Section 1983..... 3, 7

Michigan Public Employment Relations Act, P.A. 1947, No. 336, as amended P.A. 1965, No. 379... 4

Fed R Civ Pro 52(a).....5, 11, 33, 34

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS and EDWARD SHAFFER, Individually and as Representative of Other Individuals Similarly Situated and Too Numerous to Conveniently be Here Set Forth,

Petitioner,

v.

LAKE MICHIGAN COMMUNITY COLLEGE, a Public Education Institution Established Under the Laws of the State of Michigan, et al,

Respondent,

and

FRANK J. KELLEY, Attorney General of the State of Michigan, Intervening Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Lake Michigan College Federation of Teachers and Edward Shaffer, Petitioner herein, pray that a writ of certiorari issue to review the judgments of the Court of Appeals for the Sixth Circuit entered in the above entitled case on July 2, 1975 and August 14, 1975.

OPINIONS BELOW

The decision of the United States District Court for the Western District of Michigan, Southern Division, is reported in 390 F. Supp. 103 (W.D. Mich. 1974) and in Appendix, *infra,* at page 41. The opinions of the Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix, *infra,* at pages 111 and 127.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 2, 1975. Petition for rehearing and/or rehearing *en banc* was filed by appellant and rehearing was denied on August 14, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

(1) Whether petitioners had a property interest in continued public employment so as to entitled them to the due process protections of the Fourteenth Amendment to the United States Constitution?

(2) When an employee is dismissed from public employment for allegedly violating the Michigan Public Em-

BLEED THROUGH

ployment Relations Act, can a biased decision maker hold the statutory hearings determining whether the employee has in fact violated the law?

(3) Where the Court of Appeals reversed the District Court's findings of fact without holding them clearly erroneous, do the District Court's findings stand?

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

United States Constitution, Amendment 14, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

United States Constitution, Amendment 14, Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

State of Michigan Compiled Laws, Public Employment Relations Act, P.A. 1947, No. 336, as amended P.A. 1965, No. 336, MCL §423.206. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record. As amended P. A. 1965, No. 379, Section 1, Imd. Eff. July 23.

BLEED THROUGH

Federal Rule of Civil Procedure 52(a). In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Petitioner Federation is a labor organization representing teachers who are employed by respondent Lake Michigan Community College. During the year of 1972 petitioner Federation and respondent were engaged in negotiations for a collective bargaining agreement to replace the contract between the parties which was to, and did, expire on August 12, 1972. A substantial number of non-vital issues had been resolved by that date, however, a new contract had not yet been agreed upon. Despite that fact, the teachers returned to work at the beginning of the 1972-73 school year under a day-to-day agreement with the Col-

lege. On August 17, 1972 the Union requested fact-finding pursuant to the Michigan Public Employment Relations Act.

Three issues were before the fact-finder, the salary schedule, the duration of the contract, and the number of week's work scheduled for the assistant librarian. In his report issued January 11, 1973, the fact-finder made recommendations which the Union accepted. The College refused to accept these recommendations.

Negotiations deteriorated such that on February 14, 1973, the Federation filed an unfair labor practice charge against the College. On the next day the faculty began a work stoppage. Respondent College terminated the faculty on March 5, 1973, pursuant to Section 6 of the Michigan Public Employment Relations Act, M.C.L. Section 423.206. Each of the terminated faculty requested hearings provided for by Section 6 of the Michigan Public Employment Relations Act (hereinafter referred to as PERA) which were scheduled to commence on April 9, 1973.

On April 6, 1973 petitioners filed their complaint in this matter with the Federal District Court in the Western District of Michigan. Petitioners sought an injunction to prevent the Board of Trustees of the College from holding the hearing. Petitioners alleged that the teachers were not give an opportunity for a hearing before their discharges took place, and that the Board intended to combine all the hearings into a single proceeding, and that the hearings were to be conducted by less than all the elected members of the Board specifically forbidding one member of the Board to act at the hearing, and that generally the Board's actions would not meet the requirements of due process clause of the Fourteenth Amendment to the United States Constitution, since *inter alia,* the party firing the teachers

BLEED THROUGH

was to determine the validity of the firing. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. Section 1331 and 42 U.S.C. Section 1983.

Petitioners sought and obtained from the District Court an order, dated April 30, 1973, restraining the College from conducting, authorizing or arranging in any way any administrative hearing designed to determine the propriety of discharging any of the teachers until the further order of the District Court. The Court further ordered that the teachers immediately return to work and that the College reinstate the teachers in their former positions of employment at full compensation pending the final disposition of the cause or until further order of the Court.

The District Court's order was vacated by the Court of Appeals for the Sixth Circuit, in an order dated July 9, 1973, which held that the District Court's order did not purport to, nor did it, preserve the status quo, and therefore was improperly entered.

On November 13, 1973, the trial court entered an order allowing the intervention of Frank J. Kelley, Attorney General of the State of Michigan.

Trial in this matter was held on March 14 and 15, 1974. The District Court rendered its decision in a written opinion dated September 27, 1974. The Court ordered that an injunction issue restraining the Defendants from holding hearings pursuant to M.C.L. 423.206 because the Court found that the Board of Trustees of the College was not an impartial tribunal such as is required by the Fourteenth Amendment. The Court further ordered that the statutory hearing be held by the Michigan Circuit Court for the Second Judicial Circuit.

Defendants filed a Notice of Appeal dated October 10, 1974. Defendant Intervenor filed its Notice of Appeal on

October 17, 1974. Upon application of Defendants, the District Court entered its order staying enforcement of the injunction issued September 27, 1974 pending appeal of the Court's opinion. That order was dated October 22, 1974.

In an opinion decided and filed July 2, 1975, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court and remanded the case for dismissal of the complaint. The Court of Appeals held that the teachers did not have a sufficient property interest in continued public employment so as to entitle them to invoke the due process protections of the Fourteenth Amendment to the United States Constitution, and therefore the District Court did not have jurisdiction over the cause of action.

The Court of Appeals decided, alternatively, that even if the teachers did have a sufficient property interest in continued employment, it could not agree that the hearings be held by the Board of Trustees would fail to meet minimum constitutional standards.

On or about July 14, 1975, petitioners filed a petition for rehearing and/or rehearing *en banc*. The petition for rehearing was denied in an order dated August 14, 1975.

BLEED THROUGH

REASONS FOR GRANTING THIS WRIT

I.

PETITIONERS' INTEREST IN CONTINUED PUBLIC EMPLOYMENT IS SUFFICIENT TO ENTITLE THEM TO INVOKE THE PROTECTIONS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The day-to-day agreement entered into by the parties during collective bargaining provided petitioners with a property interest in continued employment.

In this matter the Court of Appeals for the Sixth Circuit found that petitioners had no entitlement to their jobs, and therefore were not entitled to the due process protections of the Fourteenth Amendment. There is no question that the respondent College is a State agency. The question is whether the relationship between the teachers and respondent College was governed by a statute, contract, understanding, etc., which provides the petitioning teachers with a property interest in continued public employment cognizable by the Fourteenth Amendment. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

In order to determine the existence or nonexistence of this property interest, it is necessary to view the situation as it existed at the time. The problem herein arose during the process of collective bargaining between the Union and the College. The following uncontroverted facts were found by the District Court. The parties began bargaining for a new contract nine months prior to the expiration of the prior agreement on August 12, 1972. However, a new con-

tract was not agreed upon. With the expiration of the prior agreement the teachers and the College entered into a day-to-day understanding whereby the teachers would return to work at the beginning of the 1972-73 school year. This understanding encompassed both the expired 1970-72 collective bargaining agreement and new terms which had been agreed upon before September 8, 1972. Appendix C, p. 47.

The parties were unable to reach further agreement and ultimately the Union filed unfair labor practice charges with the Michigan Employment Relations Commission on February 14, 1973. The next day the teachers began a work stoppage. On February 27, 1973, the College notified the faculty that if they did not return to work by March 5, 1973 they would be terminated pursuant to Section 6 of PERA. When the teachers did not return to their classrooms by March 5, 1973 the College attempted to end the day-to-day agreement and the President of the College notified the teachers that they were terminated. The teachers then requested Section 6 hearings, pursuant to PERA, which were scheduled to commence on April 9, 1973. Section 6 provides for hearings after the employee has been removed or disciplined and further provides that the officer or body having the power to remove or discipline the employee shall hold the hearing. M.C.L. § 423.206.

The relationship between the teachers and the College had many facets to it. First of all, in the previous collective bargaining agreement of 1970-72, there was a Security of Employment provision, Article X. This provision was one of those continued by the September 11, 1972 day-to-day agreement. This provision set out what are commonly known as tenure provisions. It provided that after a probationary status of two years, which could be extended another year, the status of the teachers became full-status

BLEED THROUGH

and from that full-status a teacher could not be released except for just cause and by the proper procedure. (Appendix A p. 36). There is no question but that this provision was continued by the day-to-day agreement since it was in 1970-72 contract and was not a bargained issue in these negotiations. It was to remain intact in the 1972-73 collective bargaining agreement. The number of full-status teachers was not determined at trial, however, the number undoubtedly included most of the teachers since it was acknowledged by the College that many of the teachers were at the top of the salary schedule. Appendix C at page 49. The Court of Appeals found that this Security of Employment provision was terminated by the College's termination of the day-to-day agreement. This, however, conflicts with the District Court's finding,

> . . . that the understanding was intended to extend at least to the end of the 1972-73 school year. It was day-to-day only in the sense that it could be replaced by a full collective bargaining agreement. Appendix C at page 47, n. 13.

The Court of Appeals apparently ignored this finding of the District Court in holding that the agreement was terminated by the College and that the College had the legal right to do so. However, the District Court's decision that the day-to-day agreement was for the entire 1972-73 school year was a factual finding and Federal Rule of Civil Procedure 52(a) provides that in an action tried without a jury, factual findings shall not be set aside unless clearly erroneous. The Court of Appeals made no such finding in its decision. Therefore the District Court's finding that the agreement was to last the entire 1972-73 school year must stand. Clearly, then, the College could not unilaterally terminate the day-to-day agreement and

the Security of Employment provision remained in force. Ergo, there exists the type of relationship between the teachers and the College which *Board of Regents* v. *Roth, supra,* contemplates.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Id* at 577.

Earlier, in its opinion, the Court noted,

> Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education,* 350 U.S. 551, and college professors and (577) staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff,* 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Id at 576-577.

Thus whether the day-to-day agreement is called a contract, understanding, tenure provision, or rule it is clear that at least the full-status teachers had constitutionally recognized property interest which are entitled to the Fourteenth Amendment's procedural protections.

The Court of Appeals finds that the College could legally terminate the day-to-day agreement since the strike by the teachers was a breach of that agreement. *Hortonville Education Association* v. *Hortonville Joint School District,* 66 Wisc. 2d 629, 225 NW 2d 658, 88 LRRM 3075 (1974);

BLEED THROUGH

cert granted 44 USLW 3200, October 6, 1975, rejects this type of reasoning. The Wisconsin Supreme Court stated,

> The respondents contend that no deprivation of property is involved because the employees, by going on strike, abandoned whatever property interest they had in continued employment. Going on strike, the respondents argue, is the equivalent of quitting a unilateral breach of the employment contract which dissolves any property interests for due process purposes.
>
> It is unnecessary to reach the merits of this contention, however, because the argument begs the question. One of the purposes of due process in this context is to determine whether the alleged conduct did in fact take place. To say that the performance of certain acts forecloses the requirement of a hearing to determine whether the acts were in fact performed is to engage in circular reasoning. The teachers were deprived of a constitutional property right in this case. 88 LRRM at 3082-83.

This Court is currently considering the *Hortonville* case, however, even if the case is reversed on the substantive issues the above reasoning holds true.

The timing of the alleged termination of the day-to-day agreement by the College is extremely interesting. After the work stoppage had begun the Board of Trustees passed a resolution on February 26, 1973 indicating that if the teachers were not back in the classroom by Monday, March 5, 1973 the teachers would be terminated. The resolution also contained the Board of Trustees' belief that the teachers were on strike in violation of PERA. Thus from the resolution it is clear that the Board of Trustees had on

February 26, 1973 determined that they had cause to terminate the teachers and that they had decided to so terminate. The resolution set a date for that termination, i.e., March 5, 1973. Once it was clear on March 5, 1973 that the teachers were not going to return, the Board terminated the day-to-day understanding and the Security of Employment article with it.

Consequently, the property interest provided by the Security of Employment article was supposedly terminated by the Board's action of terminating the day-to-day agreement.

Interestingly, the Board's decision to terminate the teachers was made one week prior to the ending of the day-to-day agreement. The teachers' terminations were effective on March 5, 1973 if they did not return to school by that date. If the day-to-day agreement had not been ended on March 5, 1973 the tenure provisions would have been in effect and the College would have had to comply with Article X notice and hearing procedures before it could have terminated the teachers.

The Board's attempted termination of the day-to-day agreement created a ludicrous situation. Consider. The Board grants tenure to teachers, who serve the requisite years, which means that they can only be terminated for cause and must be granted a hearing before termination, with all due process protections. Then, when the Board decides to terminate the teachers they also terminate the provision which gave them tenure and the procedure which must be followed before tenured teachers can be discharged. This sounds like double talk, but worse than that *it is* double dealing. It was no accident that the termination of both the teachers and the day-to-day agreement coincided. There was no necessity for the Board to terminate that agreement

BLEED THROUGH

in order to discharge the teachers. Even with the day-to-day agreement in force, the teachers could still have been effectively terminated. However, by a clever slight of hand the Board not only took away the teachers' jobs but also attempted to take away all the rights they had built up prior to February 15, 1973, i.e., their tenure rights. This type of action, the wholesale disregard of the rights of public employees, is what the due process clause of the Fourteenth Amendment is supposed to prevent.

B. The collective bargaining agreement between the College and the Union provided petitioners with an interest in continued employment.

Even if it is assumed, for the sake of argument, that the day-to-day agreement between the parties had been properly terminated, the teachers are still entitled to due process protections of their property interest.

In labor law it is recognized that a collective bargaining agreement is not quite the same as an ordinary contract. ". . . the collective bargaining contract is not an ordinary contract but rather, in a sense, agglomerates a variety of rights and methodology relating to the employer, the union, and the employees" *Richardson* v. *Communication Workers,* 443 F. 2d 974, 978 (8th Cir. 1971); *cert denied* 414 U.S. 818 (1973). *Richardson, supra,* further tells us that,

> The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact, one of the very incentives to union representation is job security. The employee, the union which

> represents him, the company which employs him, each contemplate a 'subsisting' contractual relationship for an indefinite period of time. 443 F.2d at 978.

This idea of "subsisting" relationship must be viewed in light of the fact that the termination of a collective bargaining agreement does not terminate all rights under it. The Michigan Employment Relations Commission has found this to be true under PERA, as have the Courts under the National Labor Relations Act. *1620 Corporation and Steslicki and Hotel Restaurant Employees,* 1972 Lab. Op. 731, 734.

> Unlike a commercial contract for the sale of goods and services, whose terms may expire at a special date, some provisions of a collective bargaining agreement may be effective beyond its expiration. (Citing *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964); *Richardson, supra,* and other cases.) . . . It is the mandatory subjects of bargaining, i.e., wages, hours and other terms and conditions of employment, which may not be changed by the expiration of a contract. 1972 Lab. Op. at 735.

That the conditions of discharge or lay-off of employees provisions are encompassed within the mandatory subjects of bargaining is axiomatic in labor law. *National Licorice Co.* v. *NLRB,* 309 U.S. 350, 6 LRRM 674 (1940); *Inland Steel Co.* v. *NLRB,* 170 F.2d 247, 22 LRRM 2506 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1948), 24 LRRM 2019 (1948). Clearly, the Security of Employment Article of the former collective bargaining agreement remained in existence despite the termination of the collective bargain-

BLEED THROUGH

ing agreement. Consequently, the teachers' property interest provided by Article X was not affected by the termination of the 1970-72 collective bargaining agreement, nor by the termination of the 1972-73 day-to-day agreement.

C. Petitioners have a legitimate expectancy of continued employment.

There is a second theory which provides that termination of the day-to-day agreement would not terminate the teachers' property interest. This argument is based on what for the lack of a better title must be called the "legitimate expectancy" theory.

The Court of Appeals viewed the teachers as having no hold on their employment at all. The Court of Appeals viewed their positions as terminable at will. However, this is an unrealistic view of the situation as it actually existed. Consider the following hypothetical. Suppose, during the time the faculty was discharged for striking, there was a teacher, who either had or had not engaged in the work stoppage. The Board decides to discharge that teacher for incompetency or some other reason described as cause in the Security of Employment provision of the former collective bargaining agreement. The Court of Appeals' decision would allow the College to fire the teacher without providing any due process protections. That a Court actually considering that question would so hold is unlikely. The full-status teachers that have not engaged in work stoppage have a reasonable expectancy of continued employment whether or not a contract is in force. And all teachers have a reasonable expectancy of continued employment until it is proven that they have engaged in

an illegal strike. At that point their reasonable expectancy ends.

In *Soni* v. *Board of Trustees,* 513 F. 2d 374 (6th Cir. 1975), the Sixth Circuit affirmed the District Court's holding that a professor who is nontenured, and whose contract had not been renewed had acquired a property interest since the University objectively acted toward him so as to lead him to believe he was a person with a relative degree of permanency in the academic community of the University. 513 F.2d at 350.

The Court of Appeals found that Appellee had a property interest even though the University had a formal, well established tenure system. Discussing the Supreme Court's decision in *Perry* v. *Sindermann,* 408 U.S. 593 (1972) the Court of Appeals stated,

> The Supreme Court has stated that a legitimate expectancy of continued employment 'is particularly likely in a college or university . . . that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice'. (Citing *Perry*). The court did not say, as it easily could have, that a reasonable expectancy cannot arise in the context of a formal tenure system. The existence of such a system is but one factor for the trial court to consider in analyzing the due process claim of a formally nontenured professor. 513 F.2d at 351.

The Court of Appeals attitude toward property interests in *Soni* v. *Board of Trustees, supra,* is much more flexible and realistic than its attitude in the instant case. (The difference in attitude may be due to the fact that teachers in the instant case were discharged for allegedly engaging

BLEED THROUGH

in an illegal strike.) The full-status teachers certainly have a reasonable expectancy of continued employment whether a collective bargaining agreement is in existence or not. It must be remembered that in the instant case we are talking about many teachers who had been with the College for a substantial period of time, some since the inception of the College. (Appendix C at Page 49). Unless it can be shown in a hearing that the teachers engaged in a strike or were terminated for cause, these teachers have a reasonable expectancy of continued employment with the College.

The fact that this case arose from a strike situation apparently caused the Court of Appeals to lose perspective of the rights of the teachers. Seemingly, the Court felt that teachers striking in violation of State law have no reasonable expectancy of continued employment. What the Court did was implicitly adjudge all of the teachers guilty of illegally striking. Since striking by a public employee is illegal in Michigan and they have already been discharged, the Court of Appeals wonders how the teachers could have a reasonable expectancy of continued employment.

Rockwell v. *Crestwood School District,* 393 Mich 616 (1975); U.S. *App pending,* deals with a similar situation. There teachers went on strike and the School Board terminated the entire faculty. The teachers in *Rockwell, supra,* were covered by the Michigan Teacher Tenure Act, MCL 38.71 *et seq.*, and therefore the Michigan Supreme Court incidentally found that the teachers had a property interest in continued employment and were entitled to due process protections. The Michigan Supreme Court also held,

that by striking, the teachers did not cease to be employees.[16] Their employment could only be terminated in accordance with the procedures set forth in Section 6 of PERA. 393 Mich at 635.

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[16] *See School Dist. for the City of Holland* v. *Holland Education Association*, 380 Mich 314; 157 NW 2d 206 (1968). If the employment relationship is severed when an employee strikes, arguably there would be no governing law. The PERA, in terms, governs only relationships between public employers and their public employees.

Under the NLRA, a striking employee remains an 'employee' for purposes of the act and remains protected against unfair labor practices. *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345; 58 S. Ct. 904; 82 LEd. 1381, 1390 (1938).

As employees the teachers were entitled to all the rights, privileges and protections they were entitled to before the strike. Their property interest, which clearly existed before the strike, either by virtue of their reasonable expectancy or by the day-to-day agreement still in existence at the time the strike began, or by the fact that mandatory subjects of bargaining i.e., the Security of Employment provision, continue even though the collective bargaining agreement has expired, continued through the strike and the termination of the faculty.

Caramico v. *Secretary of the Department of Housing and Urban Development*, 509 F.2d 694 (2d Cir. 1974) provides an analogous situation. In *Caramico*, plaintiffs are or were non-owner occupants of two to four family dwellings located in low income areas of Brooklyn, New York. Their mortgages were insured by the FHA. Plaintiffs were evicted from their dwellings and brought suit in the Federal Court under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. Sections 4601 et seq. On appeal, the Federal defendants raised the issue

BLEED THROUGH

of whether the occupants of the houses, even though not entitled to Relocation Act assistance, nevertheless have a due process right to participate in some way in the decision of the FHA not to waive its general requirement that the buildings be delivered unoccupied. 509 F.2d at 699.

The Court of Appeals found that even though plaintiffs' leases had run out and their status as occupiers of the dwellings had been foreclosed by the State Court proceedings, the plaintiffs had a property interest cognizable by the Fourteenth Amendment. The decision was based on the fact that plaintiffs had resided in the dwellings for a substantial time period. In the instant case, the Court of Appeals found that the contract giving teachers a property interest had been terminated and that PERA did not provide them with any constitutional rights. However, the Court refused to look any further. The Second Circuit in *Caramico, supra,* did look further and discovered the realities of the situation. In the instant case, the Court of Appeals has failed to make such an analysis and that failure has lead the Court to its incorrect decision. The *Caramico, supra,* case, found a constitutional property interest based solely on the fact that the individuals had lived in the dwellings for substantial time periods. In the instant case most of the teachers have been employed with Lake Michigan Community College for a substantial time period. (Appendix C, p. 49). Ergo, by reasoning in *Caramico,* the teachers herein also have a constitutional property interest.

D. The Michigan Public Employment Relations Act provides petitioners with a Fourteenth Amendment property interest in continued public employment.

The District Court found that the teachers had a property interest sufficient to invoke the Fourteenth Amendment due process protections. Initially, the District Court found the property interest arose from PERA. (Both *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann, supra,* indicate that a property interest may be granted by a governing statute.)

In describing PERA, the District Court stated:

> "An overview of PERA reveals that its fundamental purpose is to create a balance between the public employer and the public employee in the matter of labor-management relations in order to foster an equitable adjustment of interests and to ensure fundamental fairness to all concerned" (Appendix C, pp. 71-72).

The District Court discussed the strike prohibition in PERA and the fact that the employer's duty to bargain in good faith is a necessary quid pro quo of that pohibition. This quid pro quo is offered, says the District Court, in order that PERA comply with the due process clause of the Fourteenth Amendment. Otherwise, forbidding public employees to strike would impose an unconstitutional burden on them.

The District Court then discusses how PERA governs labor relations in the public sector by: (1) giving public employees the right to organize and engage in lawful concerted activities for the purpose of collective bargaining M.C.L. § 423.209; (2) the Michigan Employment Relations

BLEED THROUGH

Commission (MERC) having machinery for the purposes of defining appropriate bargaining units, M.C.L. § 423.213, and for the selection, certification, and decertification of of collective bargaining agents. M.C.L. § 423.212 and §423.214. (Appendix C, p. 73). PERA also provides for mediation and fact-finding in public employment disputes. PERA also defines certain practices as being unfair labor practices, M.C.L. § 423.210, and provides MERC with jurisdiction to hear unfair labor practice charges.

The District Court also discussed the discipline which a public employer may impose on striking employees. If the public employer chooses to discipline an employee for striking the employer must prove by competent and material evidence that the employee violated the Act. M.C.L. § 423.206. As the District Court noted, ". . . the presumption of illegality is removed for the purposes of and hearing, . . .". (Appendix C, p. 77).

The District Court further notes that public employees are still public employees under PERA regardless of whether there is a collective bargaining agreement in force or they are on strike. Citing *Garden City* v. *Labor Mediation Board*, 358 Mich 258 (1959); *School District of the City of Holland* v. *Holland Education Association*, 380 Mich 314 (1968). Also, the Court notes, all parties agree that PERA applies to this matter, which clearly is the case. Thus, the Board is required, and indeed did offer, to hold Section 6 termination hearings pursuant to PERA. Specifically the District Court states,

> Although before termination a striking public employee will usually not enjoy all the benefits and prerequisites of normal employee status, by necessary implication of PERA, he retains a legitimate entitlement to his job and also an enforceable right

to engage in protected concerted activities. M.C.L. §§s. 423.209, 423.210, 423.216. (Appendix C, p. 89).

Put more simply the public employee's termination for striking is contingent upon several things. The termination is not final or perfected until the public employer holds a hearing (if requested by the employee) within ten days of the request. The determination of a violation of PERA by the public employer must be supported by competent, material and substantial evidence on the whole record. Further, the employer's decision must be made within ten days of the hearing. Only after these steps have been taken can the termination of the public employee for striking be perfected.

In recent cases decided under the *Roth-Sindermann* standard the question appears to be whether, pursuant to the employment relationship, the employment is terminable at will. There must be something which restricts the employer's right to terminate the employee. That is not to say that the public employer cannot terminate the employee, but rather, the employee must be terminated for cause and/or terminated pursuant to some existing procedure.

Fourteenth Amendment property interests have been found in various situations. In *Young* v. *United States,* 498 F.2d 1211 (5th Cir. 1974), the Court found that an architect employed by the Army had a Fourteenth Amendment property interest in his employment since the rules and regulations of the Army and Air Force provided that an employee may be discharged only for specific reasons. A Fourteenth Amendment property interest was also found by the Seventh Circuit in *T. A. Moynahan Prop., Inc.* v. *Lancaster Village Corp.,* 496 F.2d 1114 (7th Cir. 1974).

BLEED THROUGH

In that case the employee had a contract with the public employer which provided that it could be terminated with thirty days notice. The Court felt that in spite of this provision the employee had a protected property interest since the contract was for a fixed term and contained the reasons for which it could be terminated.

Arnett v. *Kennedy,* 416 U.S. 134 (1974), decided by the Supreme Court, presents a situation similar to this case. In *Arnett* a non-probationary employee in the competitive Civil Service, was dismissed from his position in the Office of Economic Opportunity (O.E.O.) for allegedly having made recklessly false and defamatory statements about other O.E.O. employees. The Lloyd-LaFollette Act, 5 U.S.C. § 7501 (1970), provides that employees of the Civil Service of the United States shall be removed only for cause and that Act sets up the procedure under which removal may be accomplished.

The main issue in the case was whether the procedure provided comported with due process requirements. Before deciding this issue the Justices felt compelled to decide if the employee had a Fifth Amendment property interest. And, although *Arnett* was a plurality opinion, each of the nine Justices agreed that the employee had a Fifth Amendment property interest entitled to due process protections. (Obviously, Fifth Amendment due process was in question since the Federal Government was involved in that case.)

Justice Rehnquist's opinion joined by the Chief Justice and Justice Stewart more or less assumed that the Fifth Amendment property interest existed. Justice Marshall's opinion joined by Justice Douglas and Brennan stated it thusly:

> We have already determined that a legitimate claim of entitlement to continued employment ab-

> sent 'sufficient cause' is a property interest requiring the protections of procedural due process. (Citing *Roth and Sindermann.*) Thus there can be little doubt that appellee's tenured government employment, from which he could not legally be dismissed except for cause, must also be a property interest for the purposes of the Fifth Amendment. 416 U.S. at 209.

In Justice Powell's concurring opinion joined by Justice Blackmun, the employee's property interest was defined as follows:

> The federal statute guaranteeing appellee continued employment absent 'cause' for discharge conferred on him a legitimate claim of entitlement which constituted a 'property' interest under the Fifth Amendment. 416 U.S. at 166.

PERA provides similar protections. Although the Act does not govern the total employment relationship, it does govern the rights of employees to join and assist unions and to engage in lawful concerted activities. In other words, PERA governs the labor-management relations aspect of the employment relationship. Thus, PERA would come into force when an employee is terminated for engaging in concerted activities as opposed to being terminated for reasons related to his competency, etc. PERA provides that a public employee may be disciplined for engaging in concerted activities only if the activities are illegal. M.C.L. § 423.209, § 423.210, and § 423.206. Thus, PERA gives the public employee the right to engage in concerted activities in relation to his/her employment. The employee may be terminated for engaging in these activities only if they are illegal and such termination can only be accomplished by following the statutory procedure. The

BLEED THROUGH

statute gives public employees the right not to be terminated for striking, unless a hearing is given (if requested) and a finding of violation of the law is supported by competent, material and substantial evidence. (It has been held that whether an employee has or does not have a right to a hearing under state law is persuasive on the issue of the existence of a Fourteenth Amendment property interest, but not conclusive. *Adams* v. *Walker,* 492 F.2d 1003 [7th Cir. 1974].). This right given by statute can only be taken away by the public employer if that employer complies with the due process protections of the Fourteenth Amendment.

The Court of Appeals' attitude shows a disregard of the rights of the individual teacher. The Court fails to comprehend the true situation involved in this case. It holds by implication that in a strike situation, all teachers lose their property interests in continued public employment. The Michigan Supreme Court contradicted this view in *Rockwell* v. *Crestwood School District,* 393 Mich 616 (1975); U.S. *App. pending.* The Supreme Court found that even though the teachers were striking in violation of Section 6 of PERA, they were still employees, "and therefore their employment could only be terminated in accordance with the procedures set forth in Section 6 of PERA." 393 Mich App at 635. Section 6 allows discipline or discharge for one cause, that cause is for striking in violation of PERA. PERA, then, falls within the definition of a statute conferring a legitimate claim of entitlement which constitutes a constitutionally recognized property interest as provided by the opinions of Justice Marshall, joined by Justices Douglas and Brennan, and of Justice Powell, joined by Justice Blackmun in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). See also *Indiana State Employees Assoc. Inc.* v. *Boehning,* 511 F.2d 834 (7th Cir. 1975); U.S. *App. pending.*

E. The Petitioners were deprived of liberty, and therefore were entitled to the due process protections of the Fourteenth Amendment.

Before the Court of Appeals, respondents argued that the teachers were not deprived of liberty within the meaning of the Fourteenth Amendment, and for that reason they were not entitled to due process protections. "The due process concept of liberty recognizes two particular interests of a public employee, namely, (1) protection of his good name, reputation, honor and integrity and (2) his freedom to take advantage of other employment opportunities." *Lipp* v. *Board of Education of the City of Chicago,* 470 F.2d, 802, 805 (7th Cir. 1972).

There is no question but that the employees in this case lost their freedom to take advantage of their employment opportunities. The issue is whether being terminated for striking was the cause of this loss of freedom. In their argument to the Court of Appeals, respondents said no, because the termination for this reason, striking, is not a "badge of infamy" as is spoken of in *Board of Regents* v. *Roth, supra.* However, the respondents overlooked one factor. The teachers' dismissal was for violation of the law and that is a very serious charge. How many of the teachers were not hired by new employers because of being dismissed for striking is unknown. Other reasons such as age may have been given since they are more convenient. Further, because of the job market, many teachers have not even had the opportunity of being turned down.

In *Hortonville Education Association* v. *Hortonville Joint School District,* 66 Wisc 2d 629, 225 NW 2d 658, 88 LRRM 3075 (1974); *cert. granted* 44 U.S.L.W. 3200, October 6, 1975, the Wisconsin Supreme Court dealt with an identical fact situation. The teachers of the Hortonville

BLEED THROUGH

Joint School District had engaged in a work stoppage in violation of the state law. The teachers were discharged. The law suit was commenced to declare the action of the Board null and void and for reinstatement of the teachers. Two of the issues involved were (1) whether the teachers had a property interest in continued employment and, (2) whether the teachers were deprived of liberty. The Wisconsin Supreme Court answered both questions in the affirmative. In regard to the second issue, the Court stated:

> "In *Roth,* there was no stated reason for the non-tenured teacher not being re-hired. In the instant case at bar, however, the stated reasons were two: (1) The teachers had breached their contracts, and (2) they had engaged in a strike contrary to Wisconsin law. It is apparent that such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermined his opportunities for reemployment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges. 88 LRRM at 3083.

Although the *Hortonville* case is currently being considered by the United States Supreme Court, this issue was not one of the questions presented to the Court. The Court of Appeals should have applied the same sound reasoning to the instant case.

Although proving that the teachers had not been hired to new jobs because of being terminated for striking is a very difficult task, another factor is present. The legislature has chosen to provide hearings for public employees disciplined for striking. MCL § 423.206. There is no other situation in which the legislature provides for a hearing

for public employees who are not covered by any other act such as the Teacher Tenure Act. (And the Tenure Act only provides for hearings when the charges of the school board regard the character of the teacher's professional services). Clearly, the legislature singled out striking employees for special treatment because they, the striking employees, are being charged with a violation of the law. Obviously, the legislature, in drafting PERA, was aware that the liberty of an individual charged with violating the Act was as much at stake as those charged with the violation of other laws. Therefore to protect the liberty of public employees disciplined for striking in violation of Section 6 of PERA, the legislature intended to, and did so, provide employees with due process protections which must be granted by the government before terminating these employees.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT, EVEN THOUGH BIASED, THE BOARD OF TRUSTEES COULD HOLD TERMINATION HEARINGS WHICH MEET MINIMUM CONSTITUTIONAL STANDARDS.

The Court of Appeals stated that it had an alternative ground for its decision. Under ordinary circumstances, the Board of Trustees would be the body to hold the Section 6 termination hearings. The District Court held, however, that the Lake Michigan Community College Board of Trustees was biased and therefore could not be the impartial tribunal which due process requires. Ergo, the Board could not hold Section 6 hearings.

The District Court found "that the College hoped to break the Union and that the Board's intransigence on the issue of salaries was 'so provocative that it must be charac-

BLEED THROUGH

terized as being violent, if not barbaric.'" (Appendix C, p. 43).

The Sixth Circuit felt that even if the Board was biased that fact would have no bearing on the Section 6 hearings. The Court of Appeals made a glaring error. For the purposes of that argument the Court of Appeals assumed that the teachers had a property interest in continued employment, and therefore were entitled to due process protections.

One of the due process protections is an impartial decision maker. *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). For the Court to gratuitously decide that an impartial decisionmaker is not required to hold the hearing makes the due process protections, if not useless, then ineffectual. The Court states that "there will be no difficult factual or legal questions for the Board to decide." (Appendix F, p. 125). Whether that is true or not is arguable. However, even if it is true, there are still factual and legal questions to decide and allowing a biased tribunal to decide them makes a mockery out of the due process protections. The next step is to say that since the factual and legal questions are simple and we need not have an impartial decisionmaker, why not dispose with the hearing altogether since we already know what decision the biased decisionmaker will make.

A similar problem was dealt with by the United States Supreme Court in *Ward* v. *Village of Monroeville, supra.* In that case, the respondent argued that it did not matter if the hearing tribunal was biased since any unfairness at the trial level could be corrected on the appeal and trial de novo in the County Court of Common Pleas. To this argument, the Supreme Court responded by stating, See Appendix H, page 128.

> Nor in any event may the State's trial court procedure be deemed constitutionally acceptable merely because the State eventually offers Defendant an impartial adjudication. Petitioner is en (62)-titled to a neutral and detached judge *in the first instance.*' (Emphasis supplied) 409 U.S. at 61-62.

If the teachers in the instant case have a property interest in continued employment, based upon *Ward* v. *Village of Monroeville, supra,* it is clear that the Board of Trustees cannot hold the termination hearings. The hearings must be held by a neutral and detached judge especially where, as here, review of the decision of the tribunal is not de novo. MCL § 423.206.

III.

THE COURT OF APPEALS ERRONEOUSLY REVERSED THE FINDINGS OF FACT OF THE DISTRICT COURT WITHOUT FINDING THE LOWER COURT'S FINDINGS CLEARLY ERRONEOUS, ERGO, THE COURT OF APPEALS MUST BE REVERSED.

It also appears that the Court of Appeals disagrees with the District Court's finding of bias on the part of the Board of Trustees. The Court of Appeals states:

> The Board's sole objective in conducting the PERA hearings is to ensure that innocent teachers were not mistakenly identified as stikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly. (Appendix F, p. 126).

The District Court, however, found the record replete with instances which indicated that the Board would not

BLEED THROUGH

perform the Section 6 hearings fairly. By way of example, the District Court stated:

> "The Court has found, *supra,* that in early February, 1973, the College acted with the ultimate goal of breaking the Union and with the immediate goal of provoking the strike which began on February 15, 1973. After the strike began, the College embarked upon a program to finally discharge the stiking teachers as a part of the plan to break the Union, and the College has not deviated from this course since." (Appendix C, p. 96).

It is clear that the two courts viewed the record quite differently. As noted above, the Court of Appeals may reject the factual findings of the District Court only if those findings are unsupported by the evidence or clearly erroneous. Fed. R. Civ. Pro. 52(a). The same standard applies to any factual inferences drawn from undisputed facts. *United States* v. *State of Florida,* 482 F.2d 205 (5th Cir. 1973). The exact wording of the clearly erroneous standard is not important herein since the Court of Appeals never invoked that standard nor any other in reversing the District Court's findings of fact. The Court of Appeals merely ignored any findings by the District Court which it did not agree with. This the Court of Appeals may do. *Bloch* v. *Bloch,* 473 F2d 1067 (3d Cir. 1973); *Baggett* v. *Richardson,* 473 F2d 863, (5th Cir. 1973).

The District Court found that the Board of Trustees was biased, and therefore could not hold the Section 6 hearings. The Court of Appeals finds that although biased, that fact would not prevent the Board from performing fairly its duty under Section 6. The Court of Appeals tried to explain away the District Court's holding on bias with *Rockwell* v. *Crestwood School District,* 393 Mich 616

(1975). That case was decided after the District Court issued its Opinion and explained what occurs at a Section 6 hearing.

The Michigan Supreme Court in *Rockwell, supra,* merely stated the obvious as to the proceedings under Section 6. It cannot be assumed that the District Court would change its decision and rule that the biased Board could constitutionally hold the Section 6 hearings based upon *Rockwell, supra.* The District Court found that the Board could not fairly hold the hearings while the Court of Appeals found that the biased Board could fairly hold the hearings. Thus, there are two diametrically opposed findings of fact. The Court of Appeals improperly rejected the District Court's finding without holding that it was clearly erroneous as required by Fed. R. Civ. Pro. 52(a). Consequently, the Court of Appeals erred and must be reversed.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

FIEGER, GOLDEN & COUSENS
By Bernard J. Fieger
and
Mark H. Cousens
Counsel for Petitioners
19390 West Ten Mile Road
Southfield, Michigan 48075
(313) 355-5555

BLEED THROUGH

APPENDIX A

ARTICLE X

SECURITY OF EMPLOYMENT

Section 1. Probationary Status.

(a) All faculty members shall be on a probationary status during the first two years of their employment. This probationary period may be extended for one additional year at the option of the Board. A faculty member whose probationary period has been extended, shall be furnished with a definite written statement of deficiencies which necessitated such extension.

(b) Annual contracts for probationary faculty members will be renewed if both the faculty member and the College desire to continue the relationship. The Board shall indicate its desire in writing to the probationary faculty member 90 days prior to the expiration of his existing contract or by Febuary 15, whichever occurs first.

(c) Upon request, the reasons for non-renewal of a Probationary Status Teacher's contract shall be discussed with the teacher, it being understood that the basis for any non-renewal, whether or not such basis is discussed, shall not be subject to the grievance procedure.

(d) Upon successful completion of the probationary period, the faculty member will be granted a "Full Status" contract.

Section 2. Full Status.

(a) Definition:

1. The person attaining full status will be eligible to receive a continuing contract written as a permanent document which will guarantee that the services of the faculty member will be terminated only for just cause, except in the case of retirement for age, or under extraordinary circumstances.

   A. By just cause is meant cross immorality, inefficiency or incompetency, conviction of a felony, violation of contract or refusal to perform contractual duties and responsibilities.

   B. By extraordinary circumstances is meant acts of God, wars, insurrection or other situations which limit and which restrict the full operation of the College or the full operation of the division or area of assigned work of the faculty member, including substantial reductions in student enrollment.

(b) Procedure for terminating the contract of an instructor who has received full status:

1. Notice of the intention to terminate the contract must be furnished a faculty member on or before the start of the second semester of the school year in which his services are to terminate, unless the act which gives rise to the decision to terminate occurs at a later date, in which case the faculty member must be given not less than

BLEED THROUGH

90 days notice or pay in lieu thereof. A detailed written statement of the reasons for termination must accompany this notice.

2. Within 20 days after receipt of this notice the faculty member may request a hearing before the Faculty Committee on Security of Employment. This Committee shall be elected by the faculty members holding full status, and shall be comprised of three members, one elected for one year, one for two years, and one for three years. After the first year, and every year thereafter, one member of the committee shall be elected for a three-year term. This committee shall hold a hearing, obtain testimony and make a report to the President with their recommendations and supportive statements within 10 days after the conclusion of the hearing. Recommendations must have majority support.

3. The President shall review the recommendations so made. Should he take exception to them, he shall reduce to writing his exceptions and reasons therefore and forward them within 10 days to the members of the Faculty Committee on Security of Employment and to the faculty member.

4. Within 20 days after receipt of the President's report the faculty member may request a hearing before the President. This request shall be presented to the President or his designee in writing.

5. Such hearing shall be held within 20 days after the President or his designee has received the request for the hearing.

6. The President shall furnish the faculty member his written decision of the results of the hearing within seven (7) days following the conclusion of the hearing.

7. If the faculty member does not accept the President's decision, he may request a hearing before the Board of Trustees. This request shall be made in writing to the Chairman of the Board of Trustees and the President of the College within five (5) days of the receipt of the President's decision.

8. The hearings before the Board of Trustees shall be held within fifteen (15) days of such request for appeal. The faculty member and/or College may be represented by counsel and may call such witnesses as they each deem necessary. At the option of the faculty member the hearing may be:

   A. A closed hearing,

   B. a hearing with a maximum of three representatives of the faculty in attendance,

   C. an open hearing.

9. The decision of the Board of Trustees, by majority vote shall be final and binding where the grounds for contract termination are based on teaching incompetency or the failure of a faculty member to perform satisfactorily his teaching duties. In all other cases, including the question of whether the Board based its decision on the

BLEED THROUGH

above grounds, the decision of the Board of Trustees to terminate the contract of a teacher on full status shall be subject to arbitration proceedings as provided in Article V of this Agreement, upon the written request of the teacher. Such request must be filed with the President of the College within seven (7) calendar days following the receipt by the teacher of the written notice of decision by the Board of Trustees. Pending final decision on a termination, the faculty member may be suspended from all duties with pay.

APPENDIX B

Jt. Ex. 18

August 25, 1972

Mr. Edward Shaffer
Lake Michigan College Federation of Teachers
Lake Michigan College
Benton Harbor, Michigan 49022

Dear Mr. Shaffer:

This letter will confirm my telephone conversation with you regarding the College's position on the status of the Master Agreement.

The 1970-72 Master Agreement expired on August 12, 1972.

The Board of Trustees is willing to honor those provisions of the Agreement presently being negotiated which have been agreed to and signed by both parties. This would also apply to any other provisions signed and agreed to prior to September 8, 1972.

My understanding is that mediation is still on. I have talked to Mr. Wilkes, perhaps you should also.

The College is sincere in its wish to negotiate an early settlement of the new Master Agreement.

Sincerely,

/s/ William J. Niemi, Jr.
Vice President/Business Affairs

WJN:jnf

The above offer to implement the agreed upon provisions is hereby accepted.

September 11, 1972 5:35 P.M. /s/ William J. Niemi, Jr.
September 11, 1972 5:37 P.M. /s/ Edward S. Shaffer

BLEED THROUGH

APPENDIX C

OPINION

United States of America
In the District Court of the United States
For the Western District of Michigan
Southern Division

(Filed September 27, 1974)

Lake Michigan College Federation of Teachers and Edward Shaffer, indivdually and as representative of other individuals similarly situated and too numerous to conveniently be here set forth, Plaintiffs, v Lake Michigan Community College, a public education institution established under the laws of the State of Michigan, et al., Defendants.	K-49-73 C.A.

This case arose out of an employment dispute between Lake Michigan College (hereafter referred to as the College) and certain of its employees, most of whom were teaching faculty represented by the Lake Michigan College Federation of Teachers, their certified bargaining agent (hereafter referred to as the Union). Although this case was originally begun as a class action, the pleadings were amended so that the plaintiffs are the Lake Michigan College Federation of Teachers and the named individuals,

all of whom were the subjects of disciplinary action taken by the College as a result of a work stoppage which began on February 15, 1973. The defendants are the Lake Michigan Community College, a publicly created and financed two year junior college; the individuals who were members of the College's Board of Trustees, the governing body, when the dispute arose; and the President of the College, the institution's chief executive officer. The Attorney General of the State of Michigan was admitted as an Intervenor Defendant.

The gravamen of the amended complaint[1] is that certain actions taken or proposed to be taken by the defendants principally during February, March and April of 1973 in connection with discharge proceedings violated or would violate the Fourteenth Amendment due process rights of the plaintiffs to notice and hearing by an impartial tribunal before the deprivation of their protected interests by the defendants.[2] The plaintiffs are seeking reinstatement with damages incident to the reinstatement, and further declaratory and injunctive relief with respect to the proposed form of the discharge hearings. This case falls under 42 USC Sec. 1983, and this court has jurisdiction under 28 USC Secs. 1343 (3) and (4), and 28 USC Secs. 2201 and 2202.

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[1] The amended complaint is adequate to give the defendants notice of the nature of the charges against them.

[2] Although the plaintiffs might have alleged that the defendants' actions infringed their First and Fourteenth Amendment rights of freedom of association, they did not raise this issue. The major issues in this case thus relate exclusively to procedural due process.

BLEED THROUGH

I.

Before discussing the legal merits of this case, the court must make a comprehensive survey of the facts, review of the relevant Michigan public employment relations law, and survey the procedural history of this case to date.

A.

Because of the truncated jurisdiction of this court and the nature of the issues upon which this court may rule, it is necessary to make an especially thorough examination of the facts in this case, and to assess in particular the course of bargaining between the College and the Union during 1972-1973.[3]

Shortly after this case was filed, the court, after a hearing during which it was informed of the esesntial facts, issued an Opinion and Temporary Restraining Order. Although the court has since received a much greater volume of evidence, enabling a more detailed view of the case, this evidence has convinced the court that its original assesment of the case was correct. In particular, the court is convinced, as it said in its original Opinion, that the "intransigence" of the Board on the issue of salaries was "so provocative that it must be characterized as being violent, if not barbaric." The Opinion is reproduced as Appendix A, and is incorporated herein by reference.

Lake Michigan College was originally established as the Junior College of Benton Harbor by the Benton Harbor Board of Education in 1946. At a special election in 1963, the voters approved the creation of the Community College District of Berrien County, Michigan, with a separate Board of Trustees to manage the institution. Voters also approved a tax levy for twenty years from 1964 to finance

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[3] Jurisdiction and the precise legal issues raised by this case are fully discussed below.

the school. At this time, the name was changed to Lake Michigan College.

While the record does not show the date on which the Lake Michigan College Federation of Teachers (abbreviated in the record as LMCFT) was certified as the bargaining representative of the faculty,[4] it does reveal that the first collective bargaining agreement went into effect during the Fall term, 1967,[5] following a six-week strike by the faculty which was settled by voluntary arbitration.

At the trial of this cause, Dr. James L. Lehman, who had assumed his position as President of the College in July 1967, just before the strike, indicated by his expression and manner that the College authorities had never fully accepted many of the terms of the collective bargaining agreement which had been "imposed" upon the College by the arbitrators in the Fall of 1967.[6] This intense dissatisfatcion with the results of the strike and with the whole principle of collective bargaining contributed to the hostility which the College demonstrated toward the Union and the teachers, and is evidence that the College had concluded that the second strike would be the last.

Following the expiration of the 1967-68 agreement, new agreements were reached and implemented in 1968-69,

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[4] "Faculty" and "teachers" are terms used throughout this opinion to connote members of the bargaining unit, even though the unit contains some non-teaching personnel.

[5] Jt. Ex. 22.

[6] Trial Tr. at 238-240. The resentment at the infringement of management prerogatives which resulted from the 1967 arbitration perhaps accounts in part for the categorical rejection of the Union's offer to submit unsettled issues to arbitration early in February 1973.

BLEED THROUGH

1969-70, and 1970-72.[7] The number of agreements indicates that the parties have been almost constantly negotiating or preparing for negotiations since the stormy beginning in 1967. With important issues thus amost always joined, a stable union-management relationship never developed.

Although the 1970-1972 collective bargaining agreement was not scheduled to expire until August 1972, the Union initiated the process of bargaining toward a new contract in December 1971. On December 13, the Union formally wrote the College as follows:[8]

> "In accordance with Article XVIII of the Master Agreement between the Board of Trustees of Lake Michigan College and the L.M.C. Federation of Teachers, we hereby notify you of our intention to begin negotiating a successor agreement to the present Contract. Our negotiating team has been selected and it is

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[7] The collective bargaining agreements are in evidence as follows: Jt. Ex. 21, 1968-69; Jt. Ex. 20, 1969-1970; Jt. Ex. 16, 1970-72. The last agreement was not for a full two years, but went into effect on December 28, 1970, and expired August 12, 1972.

[8] In Pl. Ex. 2, Ex. 13. Pl. Ex. 2 is a series of documentary exhibits submitted during the hearings before the Michigan Employment Relations Commission Trial Examiner on the plaintiffs' unfair labor practice charge.

Pl. Ex. 2 is among a set of exhibits, Nos. 1-9, offered by the plaintiffs relating to the course and content of bargaining between the parties during 1972-1973, and relating also to proceedings before or under the auspices of M.E.R.C. The defendants have stipulated to the authenticity of these exhibits, but not their relevance. The court finds that exhibits relating to these matters are relevant to this suit. It is elementary that the resolution of procedural due process issues requires a preliminary finding and careful analysis of all the significant elements of a given sitaution. See, e.g., Cafeteria and Restaurant Workers v McElroy, 367 U.S. 886, 895 (1961). Correlatively, since justice, or the lack of it, inheres in specific situations, all the circumstances of a case must be known to enable the court to invoke a central value of the Due Process Clause, fundamental fairness.

> our desire to begin negotiations prior to the stated date of February 15, 1972, in order to conclude an agreement early. We wish to point out that [it] is possible to begin before Febuary 15 and that the contract does not prohibit it. We urge your team to prepare your position as soon as possible so we can begin."

The Union submitted a substantial number of proposals in February 1972, and had submitted all its proposals by April 13.[9] This early action by the Union was responsibly designed to ensure that there would be ample time to complete the new agreement by the beginning of the 1972-73 academic year.[10] In fact, as appears more fully below, the unreasonable demands and intransigence of the College prevented any such agreement from being reached.

It is important to note the general economic and social conditions within which the bargaining took place. It was a period of extraordinarily high inflation, and the President had imposed a ceiling of 5.5% on wage increases. Many families of modest income found it very difficult to maintain a decent standard of living.

During the fall of 1972, teacher strikes increased as public school administrators resisted pay raises which teachers required to merely stay even with inflation. Although there had been teacher strikes in 11 Michigan pub-

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[9] In Pl. Ex. 2, Ex. 20.

[10] On June 1, 1974, Michigan Governor William G. Milliken urged a group of school administrators, school board members, and teachers from around the state to undertake good faith bargaining as early as possible to avert school strikes in the fall. Grand Rapids Press, June 2, 1974, p. 1. The court observes that the Union in this case did undertake early good faith bargaining, but the College did not reciprocate.

BLEED THROUGH

lic school and college systems in 1971-72, there were 17 such strikes in 1972-73. All of the 1972-73 strikes involved contract renewals.[11]

A substantial number of non-vital issues had been resolved by early August 1972. At this time the College requested the services of a mediator to be appointed by the Michigan Employment Relations Commission pursuant to the Michigan Public Employment Relations Act.[12] A mediator was appointed, and the parties met with him.

The collective bargaining agreement expired on August 12, 1972, but the teachers returned to work at the beginning of the 1972-73 school year under a "day-to-day understanding" with the College. By the terms of the understanding, the teachers would work under the provisons of the expired 1970-72 collective bargaining agreement, except that the new contract terms which had been agreed upon before September 8, 1972, would be implemente.[13]

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[11] State of Michigan, Department of Labor, "Annual Report, Fiscal Year 1972-73," at 166, 167, Tables 8, 10 (1974).

[12] M.C.L.A. Sec. 423.201 et seq., M.S.A. Sec. 17.455(1) et seq. For convenience, the court will refer to the statutes in effect at the time this case arose as the Public Employment Relations Act, on P.E.R.A. M.E.R.C. is the administrative agency which has primary authority over labor relations in Michigan. P.E.R.A., M.E.R.C., and Michigan's employment relations policies are discussed more fully below.

[13] Jt. Ex. 18. The parties have stipulated that the agreement was a "day-to-day" understanding, Jt. Ex. 23, No. 2, but they have not stipulated as to the meaning of "day-to-day." The defendants have argued that since the understanding was without a stated term, it was therefore terminable at will, by either party. See, e.g., Trial Tr. at 46. However, the court finds that the understanding was intended to extend at least to the end of the 1972-73 school year. It was day-today only in the sense that it could be replaced by a full collective bargaining agreement.

One of the sections of the old contract which was continued was a provision whereby the Union and the faculty agreed not to strike and the College agreed not to lock out during the term of the agreement.[14]

On August 17, 1972, the Union requested fact-finding pursuant to P.E.R.A. A factfinder, Mr. J. Warren Eardley, of Grand Rapids, Michigan, was appointed. The first meeting with the fact-finder was held on October 17, 1972, but was adjourned to November 13, 1972, to give the patries an opportunity to bargain further. By the time the fact-finder's report was issued on January 11, 1973,[15] the parties had reached agreement on all but three issues, each of which was examined by the factfinder.

The three issues on which the parties were unable to agree were the salary schedule, the duration of the contract, and the number of weeks' work scheduled for the assistant librarians. The latter issue was of secondary importance. The issues of the salary schedule and the duration of the contract were closely related, and were the subject of major difficulty.

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[14] Jt. Ex. 16, Art. XVI. The no-strike, no-lockout provision reads as follows:

"STRIKES AND LOCKOUTS

Section 1. The Federation agrees it will not instigate, aid, or condone work stoppages, strikes, shutdowns or other interruptions of work during the term of this Agreement.

It is further agreed that no faculty member shall engage in a strike or work stoppage in any form during the term of this Agreement.

The College agrees that there shall be no lockouts during the term of this Agreement."

[15] The "Factfinder's Opinion and Recommendations (hereafter referred to as "Factfinder's Opinion"), is found in Pl. Ex. 2, as Ex. 11 submitted in the M.E.R.C. unfair labor practice hearings.

BLEED THROUGH

Since the first collective bargaining agreement of 1967, each of the Lake Michigan College faculty members had been paid according to where he (or she) fell upon a negotiated salary schedule referred to as the "grid." The grid set forth a schedule of salary increments along horizontal and vertical axes. An increment on the horizontal axis was attained through the acquisition of an additional degree or of a stated number of additional educational credits by the individual teacher. The vertical axis was graded by the number of years' service the teacher had given to the institution, up to a stated maximum. Progression on this vertical axis was automatic, so the salary increase was in the nature of a longevity increment. The maximum dollar amount possible on the grid was reached at eleven years' service for a person with an M.A. Degree, and at fourteen years' service for a person with an M.A. Degree plus thirty additional approved educational credit hours.[16] The record does not show the number of faculty members who had reached the maximum on the salary schedule, but there was a suggestion that there were "many" faculty members at the top of the grid during the 1972-73 academic year.[17] In each of the parties' collective baragining agreements, the whole salary schedule was increased, so that persons at the top of the scale received increases, and persons who fell within the grid received that which they

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[16] The basic salary scheme, but not the amounts, remained constant in all the agreements. See Jt. Exs. 22, 21, 20, 16. The scheme is discussed more fully in the "Factfinder's Opinion" at 1-7. A salary grid of the type used at Lake Michigan College is usual in Michigan community colleges. Buys, "Collective Bargaining in Michigan Community Colleges," 21 Journal of the College and University Personnel Association 33, 42 (1970).

[17] Tr., Proceedings on Motion to Stay Court's Order, April 30, 1973 at 15. (Hereafter referred to as "Stay Proceedings.")

would have received under the old agreement for longevity and additional education, plus the amount of the negotiated increase.

At the outset, the Union sought a one-year contract, and the College a five-year contract. Both parties soon became willing to negotiate a three-year contract, and this term became the focus of bargaining on the salary matters until early February 1973.

From the inception of bargaining in the late winter of 1972, the Union, conscious of the relentless presure of inflation on its members, demanded a general increase in the salary scale in accordance with past practices. However, the Union's demands were limited to a 5.5% increase, the amount allowed at the time under the wage and price controls.[18]

For about a year, from the winter of 1972 until early February 1973, the College "stonewalled" on the issue of salaries. It insisted that the 1971-72 salaries were high enough. The issue was never the availability of money, since the College was financially able at all times to pay all that the teachers requested. Rather, the College stated that the issue was one of "priorities." Specifically, the College insisted that during 1972-73 salaries be frozen at the 1971-72 levels, with no movement whatsoever on the vertical longevity axis or on the horizontal educational improvement axis of the grid. Tht College further more insisted that in subsequent years of the contract salary increments would be granted only on the 1971-72 scale.

A salary freeze in a time of inflation means a reduction in real wages. Despite consistent past practices and the

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[18] Factfinder's Opinion, at 4-5.

BLEED THROUGH

institution's ability to pay, this is what the College demanded of the teachers. Moreover, the College demanded rigid adherence to the 1971-72 scale in the future, whatever the inflationary state of the economy. Under the circumstances, these demands were arbitrary, capricious and unreasonable.

The College's tactics of "stonewalling" on the most vital issue of wages is the modern counterpart of the union-busting tactics used by employers in the early years after the passage of the National Labor Relations Act in 1935. The N.L.R.A. gave employees in most private industry the right to organize and bargain collectively so as to partially equalize the bargaining power of labor and management, to bring peace to the nation's industries, and to improve wages, hours, and working conditions over the long run. One tactic employers used to break the unions formed under the authority of the Act was to simply refuse to bargain on one or more vital issues.

Similarly, the Michigan Public Employment Relations Act gave public employees the right to organize and bargain collectively. P.E.R.A. included a no-strike provision, but a *quid pro quo* for the prohibition on strikes was an extra duty on the employer to be fair in bargaining. The College's stonewalling tactic was, in light of the parties' bargaining history and the inflationary economic conditions, a deliberate attempt by the employer to break the Union, and plainly a disruption of the balance between employer and employee which P.E.R.A. intended to establish.

After the hearings on the salary and contract duration issues, the M.E.R.C.-appointed factfinder, on January 11, 1973, found that the College's position on salaries was "impractical and unrealistic". Comparing Lake Michigan Col-

lege teachers' salaries with those of other junior colleges around the state and with public schools in the local area, he found that Lake Michigan College salaries were lower than some, higher than others, and competitive for the area. The factfinder recommended the retention of the grid system and an increase at all levels, in accordance with past practice, in the amount then established as a maximum by law, 5.5%. The factfinder also recommended the negotiation of a three-year contract.[19] While the Union urged the acceptance of the factfinder's recommendations, the College rejected them.

After the issuance of the Factfinder's Opinion, the parties had bargaining sessions on February 2, 7, and 13. Although events moved rapidly during this period, and the bargaining was complex, the major developments can be summarized. The Union negotiating team reluctantly proposed to substantially write off 1972-72, and to move almost immediately to negotiations concerning 1973-74 and subsequent years. The Union offered and the Colleges accepted a one-year contract for 1972-73, with salaries at the 1971-72 level, except that those teachers who had earned sufficient additional graduate credits would receive increments on the horizontal scale under the 1971-72 contract.[20] However, the faculty voted to reject this proposal.

With the Union and faculty thus split, the College moved to the attack. It significantly modified its earlier position by now insisting upon a complete abolition of the vertical longevity incremental scale, so that teachers would no

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[19] Id. at 9 ff.

[20] In Pl. Ex. 2, Ex. 18.

BLEED THROUGH

longer be entitled to automatic increases up to the maximum on the scale simply for serving additional years.[21] The College was willing to grant increases on the horizontal education scale, and was also willing to grant for the immediate future increases "equivalent" to those which would be called for if the full grid were in effect. However, in the face of the uncertain and inflationary economic conditions, the principle of the grid was to be done away with forever, and the teachers were modestly asked to join in the execution.

By making this offer, the College deliberately drove the faculty to the wall and the Union to the breaking point. The College escalated a battle over salary levels into a war over the grid principle and then offered the Union a Phyrric victory (equivalency increases) in the battle in return for ultimate and total surrender in the war. If the teachers rejected this latest offer, and the Union did nothing but show up for negotiating meetings, there would be no salary increase whatsoever and no final collective bargaining agreement for the indefinite future. The Union would be effectively broken. However, in light of all the circumstances — the inflationary pressures felt by the teachers, the adverse faculty reaction to the proposed fore-

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[21] The defendants have suggested that the abolition of the vertical longevity incremental scale was not a new principle introduced in February 1973, but a principle implicit in the proposal for frozen salaries, which was laid on the table in the spring of 1972. However, a proposal to freeze salaries for a single year is not the same as a proposal to abolish the whole principle of the grid for the future. Before February 1973, the proposal for frozen salaries was offered in conjunction with proposals for a five-year or three-year contract, with the 1971-72 salary grid being in effect for the years after the first. The earlier proposals thus carried no direct threat to the principle of the salary grid. Nor, when the Union offered a one-year contract on February 7, did it contemplate an abolition of the principle of the grid as a basis for future bargaining.

going of the longevity increment; the obvious exasperation of the teachers with the College's assault on their security; and the number of teachers' strikes around the state —the only humanly possible reaction of the teachers was to strike. And once the strike occurred, the College would have a public relations and legal advantage, and could finally break the Union.

The court concludes that under all the circumstances known to the College at the time, the College's proposal to abolish the salary grid must have been and in fact was made with the ultimate goal of breaking the Union in any event and with the immediate goal of provoking a strike.

The court also concludes that the attack upon the Union was the first, substantial, foreseeable, and in fact foreseen, cause of the ensuing strike.

On February 14, 1973, the Union filed unfair labor practice charges with M.E.R.C., alleging that the College had failed to bargain in good faith. (The original charge was made more explicit by a Bill of Particulars filed on March 8.) After hearings on these charges on March 19, the M.E.R.C. Trial Examiner concluded that the College had committed no unfair labor practices.[22] On appeal, the M.E.R.C. concurred and dismissed the charges against the College.[23]

Meanwhile, on February 15, nearly all of the faculty of Lake Michigan College began a work stoppage, allegedly solely to protest the College's unfair labor practices. Although some College classes remained in session, most of those taught by full-time instructors did not meet. The

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[22] Def. Ex. 4.

[23] Def. Ex. 9.

BLEED THROUGH

College made several appeals to the striking faculty to return to work, but most remained on strike.

The College might have gone to court to seek an injunction to end the strike, School District for the *City of Holland* v. *Holland Education Association,* 380 Mich. 314, 157 N.W. 2d 206 (1968); see also, *Board of Education for the School District of the City of Detroit* v. *Detroit Federation of Teachers,* No. 18675 (Mich. Ct. App., Sept 12, 1974), at 5, but it did not do so. The College presented much evidence in this court as to the harm the strike did to students and to the operations of the institution. If the College had been truly concerned about protecting the students, it would have certainly at least attempted to get an injunction.

If the College had sought an injunction, it would have had to convince the court that it had "clean hands", that it was not guilty of unfair labor practices or other conduct which would make it inequitable for the court to enjoin the strike. *School District for the City of Holland, supra,* 157 N.W. 2d at 211. Perhaps one reason the College did not seek an injunction was that it knew that it had deliberately engaged in conduct of which no court could approve.

Certainly, an additional reason that the College did not seek an injunction was that the Board did not want one. If an injunction issued and the teachers returned to work, then the College's plan to quickly and finally break the Union would have been compromised. Conversely, the fact that the College did not even seek an injunction when it might have is some indirect evidence of a plan to keep the striking teachers out.

Instead, the College embarked on a program to finally discharge the striking teachers so as to finally break the Union. After the teachers refused to return to work, the

College began offering permanent contracts to replacements. The assumption was that the striking teachers were gone from the College forever.

On February 26, 1973, the Board of Trustees passed the following Resolution:[24]

"RESOLUTION

WHEREAS, the Board of Trustees of Lake Michigan College has observed and been informed that several faculty members are engaging in a strike for the purpose of inducing, influencing, and coercing a change in their compensation and other conditions, rights, privileges, and obligations of employment, and

WHEREAS, such activities are illegal and prohibited by the State of Michigan's Public Employment Relations Act, and in violation of the faculty's obliga-

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[24] Jt. Ex. 3. During the trial, the defendants objected to questions to members of the College Board of Trustees concerning each trustee's interpretation of the February 26 Resolution. See, e.g., Trial Tr. at 180. The objections were put variously in terms of the best evidence rule and the parol evidence rule, and summed up in the sentence, "The document speaks for itself." Id. These objections were not well taken. The parol evidence rule is a rule of substantive law which simply does not apply to restrict evidence concerning the interpretation of Trustees' Resolutions. See 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Sec. 2400 ff. (3d ed. 1940). The "best evidence" objection covers a variety of sins. However, there is no question here as to the content or the authenticity of the Resolution. It can hardly be objected that a Trustee's testimony as to his interpretation of a Resolution is irrelevant, without probative value.

If the Resolution does speak for itself, it does not speak alone. The court should take and consider probative, trustworthy evidence concerning its proper interpretation. See 3 Id. Secs. 1171-1175. (Chadbourn ed. 1972.)

BLEED THROUGH

tion to provide full, faithful, and proper performance of their duties of employment,

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of Lake Michigan College terminates such faculty members' status and employment effective Monday, March 5, 1973, unless any such faculty member shall report and resume the full, faithful, and proper performance of their duties of employment on or before such date; and

BE IT FURTHER RESOLVED that the Board of Trustees hereby authorizes the President of the College to promptly notify such faculty of this resolution, and to perform such other acts as may be necessary to carry it out.

EXECUTED this 26th day of February, 1973."

The next day, the College, by its President, wrote to each striking faculty member. The letter informed the teacher of the Board's actions, stated that according to the College's observation and information the faculty member was illegally on strike, and continued:[25]

"If you do not return to the full, faithful and proper performance of your duties of employment on or before March 5, 1973, you will be terminated. Your position on the faculty of this institution will be considered vacant and someone else will be sought and employed to perform your duties. If your absence is due to reasons other than those stated herein, please promptly contact me, or in my absence, Dr. Walter Browe."

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[25] Jt. Ex. 4.

On March 5, the College terminated the Union-College "understanding" of September 11, 1972. The letter informed the Union that the action was "occasioned by your organization's no strike provisions in Article XVi."[26]

On March 6, the College, by its President, again wrote to each striking teacher. The letter informed that faculty member that according to the College's "observation and information," he (or she) was illegally on strike.[27] The letter continued:[28]

> "Your status as a faculty member, therefore, is terminated as of this date.
>
> Within the next ten days you may request in writing a hearing to determine whether your conduct in fact has violated the Act. Such notice should be directed to me at the College, and, if received within the required time, a proceeding thereafter will be commenced, and a decision made concerning your violation of the Act and the proper discipline, including termination."

By letter to the College dated March 5, fifty-two of the striking faculty had demanded hearings under Section 6 of P.E.R.A. to determine whether they had violated the

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[26] Jt. Ex. 19.

[27] Jt. Ex. 6.

[28] Id.

BLEED THROUGH

Act. The teachers waived the time limitations in the Act "because of the number of hearings being requested."[29]

Although the P.E.R.A. hearings were scheduled for early April, this suit intervened, and the hearings have not yet been held.[30]

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[29] Jt. Ex. 31. The form of the requested P.E.R.A. hearings was determined by the Board of Trustees by Resolution dated March 26, 1973 (Jt. Ex. 13):

"RESOLUTION

WHEREAS the Board of Trustees of Lake Michigan College terminated certain faculty members effective Tuesday, March 6, 1973, for absenting themselves from their positions and abstaining from the full, faithful, and proper performance of their duties for the purpose of inducing, influencing, and coercing a change in their condition of employment, and

WHEREAS, certain such faculty members have requested a determination as to whether they have violated the provisions of the Public Employment Relations Act.

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of Lake Michigan College hereby appoints Robert P. Small, Donald L. Eppelheimer, and Earl H. Place as the officers and body to commence and hold proceedings for the determination of whether such faculty members have violated the provisions of that Act; and

BE IT FURTHER RESOLVED that the Board of Trustees hereby authorizes such officers and body to perform such other acts as may be necessary to carry out such proceedings, and to report back to the Board of Trustees their recommendations with respect to a decision concerning such faculty members terminations.

EXECUTED this 26th day of March, 1973."

[30] This court originally issued a temporary restraining order restraining the holding of these hearings. This order was subsequently set aside on order of the Sixth Circuit Court of Appeals. However, the College agreed not to hold the P.E.R.A. hearings pending the risposition of this cause. TRO Proceedings at 100; Pre-Trial Brief on Behalf of Defendant, Lake Michigan Community College, at 3 (hereafter cited as Def. Pre-Trial Brief).

The parties have argued at some length, and presented much testimony, concerning the proper characterization of the Resolutions passed and the letters exchanged between the parties between the dates of February 26 and March 6. The defendants argue that although the College's intent was to permanently terminate the striking faculty as of that date, and to recruit a new faculty as soon as possible, still, in light of P.E.R.A.'s hearing and appeal requirements, the "terminations" of the plaintiffs were in legal effect "suspensions" until the final determination by the Board on the record made by its committee. In line with this argument, the defendants contend that the February 26 Resolution was in the nature of a rule or policy; that it was final as to no particular teacher; that the President of the College made the initial determination as to which individual teachers to "suspend", signalled by the letters of March 6, and that the hearings were for the dual purposes of inquiring into the merits of the President's determination and of finally terminating those judged to have violated the Act. The defendants are arguing that their institutional structure and course of action with regard to the striking teachers is closer to the ideal model of administrative due process than might appear on first impression. They are also suggesting, although they have not strenuously argued, that this cause is not ripe for adjudication.

The plaintiffs, on the other hand, argue that the February 26 Resolution by its own force operated as a final discharge from employment as of the end of March 5, subject only to the condition that the teacher had not returned to work. The scheduled hearings were thus post-discharge hearings, in the nature of a review of a decision which had already been made.

BLEED THROUGH

When the parties dispute an interpretation or characterization of acts and events, the court ought to give great weight to the parties' contemporaneous interpretations and assumptions, insofar as these can be ascertained. The court finds the defendants' interpretation to be strained, and the plaintiffs' more in accordance with the intent of the actors and the effect of the actions on the parties and events. It is apparent that the defendants and other College administrators intended the word "termination" to have its ordinary meaning, that is, discharge or firing, not suspension. The success of the College's recruitment of replacements depended in part upon the College's representations that the terminations were final. The replacements which were hired appear to have been treated as permanent. The plaintiffs likewise have assumed that they were finally terminated as of midnight March 5, and the defendants have done little to alter this assumption aside from verbal gestures in connection with the application of P.E.R.A. or in connection with this lawsuit.

The defendants can get little help from the general principles of administrative law or from the particular provisions of P.E.R.A. The February 26 Resolution cannot be fairly characterized simply as a "policy" or policy statement of the Board. The legislature had already laid down the general policy concerning economic strikes, at least, in P.E.R.A., so the Resolution laid down no new rule of conduct. It appears that those to whom the "policy" was to apply were sufficiently known and identified by the College authorities on February 26 so that it cannot be said that the "policy" applied to a general class of people whose composition shifted according to decisions made on grounds extraneous to the matter under consideration. The Chairman of the College Board testified that the Trustees "made a finding that those who were out at that time [Feb-

ruary 26] were in violation of the law,"[31] and, as noted, the College conceded that it intended the February 26 Resolution to operate as a permanent termination as of March 5, unless the strikers avoided the effect by returning to work at that time. Such a finding and effect are not characteristic of a general "policy" or of a legislative decision, but of an adjudicative decision, a judgment or decree. Under the circumstances, the application of the judgment to the individual strikers by the President on March 6 was in the nature of an execution of a judgment. Thus, the March 6 "termination" of the striking faculty cannot be characterized as a mere "suspension," a step in the initiation of administrative action rather than an event of independent final significance. Similarly, the defendants' analysis does not logically, naturally, or necessarily flow from Section 6 of P.E.R.A. or from the relevant case law.

The court also finds that the relations between the top administrative officials and the Board of Trustees were extremely close. Mr. Richard Gates, a member of the Board, testified at the M.E.R.C. hearings that the Board gave no formal instructions to the administration concerning the College's bargaining position. Rather, Mr. Gates indicated that the administrators "usually" meet with the Board in executive session, and that after discussion a "concensus position" was developed.[32] Under these cir-

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[31] Trial Tr. at 352.

[32] Lake Michigan College, No. C73B-33, Proceedings before Trial Examiner of M.E.R.C. (March 19, 1973), at 14. [Hereafter cited as "M.E.R.C. Transcript."]

The Transcript of the Proceedings before Trial Examiner of M.E.R.C. is technically hearsay. However, the defendants did not make a hearsay objection at trial. They had adequate opportunity to cross-examine during the M.E.R.C. hearings, and the issues there were similar to those here, so they suffer no prejudice.

BLEED THROUGH

cumstances, there was certainly no separation of functions even remotely analogous to that which exists in large governmental administrative agencies between the prosecutorial and adjudicative divisions.

The court concludes that the February 26 Resolution operated to discharge the striking teachers as of midnight, March 5. The hearings which the College has proposed to conduct under P.E.R.A. are thus post-discharge hearings, in the nature of a review of action already taken.

After the beginning of the strike and the discharge of March 5, negotiations between the College and the Union continued intermittently with a view to resolving the issues and ending the strike. However, the Union and teachers effectively abandoned their strike as early as March 22, 1973. On that date, the Union delivered a "Corrected Copy for [sic.] Federation Proposal" to end the strike.[33] Point One was that all striking factulty members would immediately return to their former positions, and no reprisals would be instituted for striking by the College. The Proposal then added a face-saver for the Union. The Union proposed that if it prevailed before M.E.R.C. on the then-pending unfair labor practice charge, then the College would grant the factfinder's recommendations, reinstitute the previously bargaining sections of the contract, and make other relatively minor changes. If the College prevailed on the unfair labor practice charge, on the other hand, the faculty would finally accept the College's freeze on salaries for the 1972-73 school year, and would guaran-

[33] Jt. Ex. 12. On March 21, the Union had delivered its original proposal. Jt. Ex. 11. The corrected copy added the clause, "the librarians' and counsellors' loads will be equalized," to the list of changes the College would do in the event the Union prevailed on the unfair labor practice charge.

tee a complete full semester's work for each student. "At the end of the current semester," the Proposal continued, "the status of each striking faculty member would revert to the present status."[34]

At trial, the head of the Union negotiating team testified that, while the total situation continued to be discussed, the offer to return to work was not conditioned on the College's full acceptance of the Proposal.[35] The striking teachers had obviously been defeated and were in fact prepared to return to work immediately, whether or not the College accepted the Union's face-saver. The only truly operative sections of the March 22 Proposal were those being adding up to a total surrender. Under the circumstances, the court concludes that the strike was fully abandoned by the teachers on March 22, 1973, and that the College knew this fact. The fact that the College refused to accept the return of its experienced teachers is evidence of a resolute plan to destroy the Union and to make its discharges stick.[36]

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[34] At trial, defendants contended that the "status" to which the Proposal referred was strike status, so that the Union was asking the College to accept a return to strike status in the event the *College* won before M.E.R.C. Trial a 130-131. Edward Shaffer, head of the Union's negotiating team, testified that "status" did not refer to strike status, Id. at 130, and the court cannot find that a Union against the wall would place such a harsh proposal on the table. Instead, the "present status" referred to the status of no collective bargaining agreement, no collective understanding, and no signed, written, individual teachers' contracts in hand. This sentence was merely an acknowledgment of an existing situation, a situation which was almost wholly beneficial to the College.

[35] Trial Tr. at 127.

[36] The College insisted before this court that it did not understand the Proposal of March 22 and the attendant discussions to constitute an unconditional offer to return to work within the standards established by federal labor relations law. See, e.g., Trial Tr. at 49-50. The court does not believe the standards evolved in federal labor law apply to this aspect of the case.

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BLEED THROUGH

On March 29, 1973, Union and College negotiators met in a mediation session at the office of M.E.R.C. Chairman Robert G. Howlett in Grand Rapids. At that time, the College made the Union an offer to conclude a new three-year collective bargaining agreement. The M.E.R.C. Trial Examiner found that the College offered the Union as bargaining agent for those actively employed by the College, including the strike replacements, "more than had been previously offered across the bargaining table before the strike . . . inasmuch as the offer of March 29, in addition to the granting of the grid raise during the school year 1972-1973, included a cost-of-living increase during the years 1973-1974 and 1974-1975."[37] The offer also included a proposal that all faculty members who had been terminated because of engaging in a strike should resign as of March 5, and the College would accept the resignations, thereby revoking the earlier terminations.[38] The Union rejected the College's proposal, and on April 2 made the proposal the basis of another (or, technically, an amended) unfair labor practice charge before M.E.R.C. The M.E.R.C. Trial Examiner accepted all the facts alleged in the Union's affidavit as correct. However, he concluded that the

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The Union could not and did not draw its March 22 Proposal with reference to the rights guaranteed them and liabilities imposed upon them by federal labor law. However, considering the general policies of federal labor law as stated in the basic acts and expounded by the N.L.R.B. and the courts, this court is not prepared to say that, under the circumstances, the March 22 Proposal was not an "unconditional" offer within the meaning of the federal law. Even under the strictest of standards, all possible doubt that the teachers had finally abandoned their strike was eliminated by the filing of the complaint with this court on April 6, 1973, and the discussions immediately subsequent thereto. See Trial Tr. at 128.

[37] Def. Ex. 4 at 10.

[38] Id. at 6.

Union remained the exclusive bargaining agent for all the employees and that the College had the obligation "to made any offer toward achieving a collective bargaining agreement."[39] M.E.R.C. accepted the Trial Examiner's conclusion without comment.[40]

The March 29 offer was merely another attempt to embarrass and defeat the Union. Under Michigan labor law, the union is deemed to be the exclusive collective bargaining representative of the strike replacements, even though the replacements are not union members and have interests adverse to those who are. The Union's ties were naturally with the striking teachers. By making the Union a salary proposal for the replacements which the Union could not possibly accept, the College ensured that the Union would not be embraced as benefactor and protector by the replacements.

The College's reaction to this court's Order of April 30, 1973 is also reflective of the Board's general attitude toward the teachers. After suit was filed by the Union, this court ordered the College Trustees to "immediately reinstate and continue the teachers in their former position of employment at full compensation from the first day of May 1973 . . ." In an effort to ensure cooperation between the returning teachers and the replacements so that the students would be protected, this court also ordered that the "reinstatement procedure be adjusted so as to avoid discontinuity of student studies and grading."

When the teachers returned to work under the court order on May 1, they were given a letter from the Executive Vice President of the College. The letter was addressed, "Dear Former Faculty Member," and it requested

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[39] Id at 11.

[40] Def. Ex. 9.

BLEED THROUGH

the teachers to sign a list of returnees. The letter continued, "Pursuant to an order of the Federal District Court, you will be placed on the College's payroll as of today. At this time you have not been assigned any duties, and you are to remain at home and await our call."[41]

This action by the College was a deliberate failure to execute the Order of this court in good faith. Sending the teachers home was designed to further frustrate and humiliate them. The order to "immediately reinstate and continue the teachers in their former position of employment" plainly *meant reinstatement to their former position* as *active* teachers. That part of the order which referred to an adjustment of the procedure to avoid discontinuity of student studies and grading was a mandate for cooperation, and could not be interpreted by any fairminded person as negating the reinstatement order.

The returning teachers properly and correctly thought they were supposed to assume their duties, and many went to their offices and classrooms. Naturally, some confusion developed, but, as testimony taken at trial showed, there were no serious incidents.

Having manufactured confusion by failing to execute the order of this court in good faith, the College exploited the resulting situation in the Court of Appeals. The counsel for the College filed an affidavit recounting information he had received by telephone from the Executive Vice President of the College. Counsel stated as follows:[42]

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[41] Pl. Ex. 10.

[42] Appeal from a Mandatory, Interlocutory Order of the United States District Court for the Western District of Michigan, Appendix at 237-238, Lake Michigan College Federation of Teachers v. Lake Michigan Community College, No. 73-8084 (6th Cir.) The Appendix was submitted here at the request of the Three-Judge Court. This affidavit was based substantially upon hearsay, twice removed, with inherent probability of error.

"3. He is reliably informed that the plaintiff-teachers herein, members of plaintiff Union, appeared en masse at the College campus this morning, forced their way into the students' classes then in session, either by physically ejecting the new instructors or stating to them that the former instructors (the plaintiff teachers) were there by Court order, and the new instructors were to leave immediately, and created a mass disturbance in the lounge by exciting students with statements that the College was in contempt of the District Court's order for not having immediately placed the former instructors back in their class rooms; and that several of the new instructors or old instructors who did not strike have left the campus under fear of violence and retaliation for their having worked during the strike since February 15, 1973.

"4. He also is reliably informed that numerous students, as a result of such conduct, have left their classes, have stated their intentions not to return under these or any similar circumstances and/or are quitting their education at the College.

"5. He also is reliably informed that the Board of Trustees of the College and its administration are seriously considering completely and finally closing the College under these disruptive circumstances."

The court concludes that counsel's affidavit represented a deliberate and gross exaggeration and misrepresentation of the true situation at Lake Michigan College on May 1, 1973. The College authorities were so determined to prevent even a temporary return of the striking teachers that they fabricated a vision of anarchy which was presented

BLEED THROUGH

to the Court of Appeals in an attempt to influence a decision in their favor.

On July 3, 1973, there was another mediation session with the College and the Union, this time at the office of Employment Relations Commissioner Ellman in Detroit. At trial, the attorney for the defendants stated that the attorney for the plaintiffs said at the meeting that the strikers were now clearly offering unconditionally to return to work. The attorney for the plaintiffs stated that he really said that the strikers were now offering unconditionally to return to work since it apparently had not been clear to the College that such an offer had been made previously. The witnesses for the defendants tended to support the testimony of the defendants' attorney; the witnesses for the plaintiffs tended to support the testimony of the plaintiffs' attorney. There is no doubt that the plaintiffs made an unconditional offer to return to work on July 3. In view of the court's previous findings on the matter of the offer to return, the court does not need to resolve the question of what the plaintiffs' attorney actually said on July 3.

Section 6 of P.E.R.A.[43] prohibits public employees, such as the teachers who are plaintiffs here, from engaging in strikes "for the purpose of inducing, influencing or coercing a change in the conditions of compensation or the rights, privileges, or obligations of employment." If the teachers have engaged in such a strike they may be discharged. P.E.R.A. operates to designate the College Board as the tribunal to determine whether the striking teachers violated the Act. That determination has not yet been made. Although the teachers have not denied that they were en-

[43] M.C.L.A. Sec. 423.206.

gaged in concerted action, both the Union and the teachers have denied that they engaged in a strike for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment. Potentially, the Union and teachers have raised two separate major issues under P.E.R.A., one of law, and one of fact. The legal issue is whether there is a distinction in Michigan public employment relations law between an economic strike and an unfair labor practice strike, and if so, what the effect of distinction is.[44] The factual issue is whether the Union and teachers were engaged in an economic or an unfair labor practice strike. The court finds that under P.E.R.A. both the legal and factual issues are substantial and non-frivolous. The court does not and will not resolve these issues, for the only major question raised by the complaint for this court is whether, under all the circumstances, the Due Process Clause restricts the tribunal and the time and manner in which these issues may be resolved.[45]

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[44] In federal labor relations law, the question of whether the employees are engaged in an unfair labor practice rather than an economic strike is determined by trying before the N.L.R.B. the question of whether the employer in fact committed an unfair labor practice. However, the federal rule emerged from a statutory and policy context different from P.E.R.A. Section 6 of P.E.R.A. expressly requires an affirmative finding of the strikers' "purpose." It is possible that employees may be found to be on strike for the purpose of protesting an unfair labor practice even though no unfair labor practice has in Michigan law been committed by the employer, so long as the employees immediately return to work when M.E.R.C. makes such a finding. If *all* strikes are held to be prohibited, then the "purpose" clauses of Sections 1 and 6 are nugatory. The court makes no attempt to solve these problems of statutory construction.

[45] Since the court is not called upon to determine either the purpose or legal validity of the teachers' strike, this case is vastly different from Bennett v. Gravelle, 323 F.Supp. 203 (W.D. Md.), aff'd. 451 F.2d 1011

(continued on next page)

BLEED THROUGH

B.

The legislative heart of Michigan public employment labor law is the Hutchinson Act, Mich. P.A. 1947, No. 336, as amended, Public Employment Relations Act, P.A. 1965, Nos. 379, 397, and P.A. 1973, No. 25.[46] M.C.L.A. Secs. 423.-201 et seq., M.S.A. Sec. 17.455(1) et seq. P.E.R.A., in conjunction with other laws, establishes an institutional and legal framework which structures, influences, and to some extent controls the relations between some public employers, including the defendants and their employees. An understanding of this framework is essential to a proper analysis of the case presently before the court. As a practical matter, the legal institutions and rules influenced the actions of the parties at every step in the developments which led to the filing of this suit. As a legal matter, all the major issues of this case can be intelligently resolved only with continuing reference to Michigan labor law.

An overview of P.E.R.A. reveals that its fundamental purpose is to create a balance between the public employer and the public employee, in the matter of labor-management relations in order to foster an equitable adjustment of interests and to ensure fundamental fairness to all con-

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(4th Cir. 1971), cert. dism. 407 U.S. 917 (1972). There, several public employees went on strike, allegedly to protest the employer's racially discriminatory policies, and these employees asked the court to create a substantive constitutional exception to the state's public employee no strike policy. The court refused to create an exception based upon the alleged purpose of the strike.

[46] Most of the events having significance for this lawsuit occurred before the effective date of P.A. 1973, No. 25, June 14, 1973. Consequently, P.E.R.A. as amended through 1965 applied at the time the present controversy arose. The 1973 Act did not amend Sec. 6 of P.E.R.A., M.C.L.A. Sec. 423.206, the provision which has primary impact upon this case.

cerned. As Justice Frankfurter put it, "*[t]he heart of the matter is that democracy implies respect for the elementary rights of men . . .; a democratic government must therefore practice fairness . . .* " Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 (1951). (Concurring Opinion.) (Emphasis supplied.) Thus, employees are forbidden to strike,[47] but as a necessary *guid pro quo* employers are under an especially strong duty to bargain in good faith.[48] This duty is certainly imposed by P.E.R.A. itself. This construction of P.E.R.A. follows not only from the express words of the Act, but also from the traditional assumption that state's law-makers intended to comply fully with the obligations imposed by the Due Process Clause of the Fourteenth Amendment. Speaking to the similar problem of procedural guarantees afforded federal employees, the United States Supreme Court has said, "where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. [Citations omitted.] These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the

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[47] M.C.L.A. Sec. 423.206, quoted in full, infra, n. 52.

[48] M.C.L.A. Sec. 423.215 reads in pertinent part: "A public employer shall bargain collectively with the representatives of its employees . . . For the purposes of this section, to bargain collectively is the performance of the *mutual obligation of the employer and the representative of the employees* to meet at reasonable times and *confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." (Emphasis supplied.)

BLEED THROUGH

Nation's lawmakers . . ." Greene, *supra*, 360 U.S. at 507-508.

The state agency principally concerned with public employment relations is the Michigan Employment Relations Commission (formerly called the Labor Mediation Board and here referred to as M.E.R.C.), composed of three members. M.C.L.A. Sec. 423.3. M.E.R.C. does not have exclusive jurisdiction in this area, since both public employers and the state courts also have extensive jurisdiction in particular circumstances.

Public employees are given the right to organize and to engage in lawful concerted activities for the purpose of collective bargaining. M.C.L.A. Sec. 423.209. Under the auspices of M.E.R.C., machinery is established for the definition of appropriate bargaining units, M.C.L.A. Sec. 423.213, and for the selection, certification, and decertification of collective bargaining agents. M.C.L.A. Secs. 423.212, 423.214

Procedures and services are established whereby M.E.R.C. may assist in the resolution of public employment disputes. The basic tools are mediation, M.C.L.A. 423.207, and factfinding, M.C.L.A. Sec. 423.25.

Public employers and labor organizations and their agents are specifically prohibited from engaging in certain enumerated unfair labor practices.[49] M.C.L.A. Sec. 423.210. M.E.R.C. is given jurisdiction to hear unfair labor practice charges and to issue cease and desist orders, which are enforceable by the Court of Appeals. Any person aggrieved by a final order of M.E.R.C. granting or denying relief

[49] Before the adoption of the 1973 amendment, P.E.R.A. did not expressly prohibit unfair labor practices by unions, and M.E.R.C. had no jurisdiction in this area.

may likewise seek review in the Court of Appeals. M.C.-L.A. Sec. 423.216.

Since the original enactment of P.E.R.A. in 1947, strikes by public employees have been statutorily prohibited.[50] However, the relevant language of the Act, which has been the same since 1947, creates some doubts as to whether all strikes are proscribed. The Act specifically prohibits concerted work stoppages "for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment." Assuming there are meaningful distinctions

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[50] The 1965 version of the basic no-strike provision, in force when this case arose, reads as follows:

> "Sec. 1. As used in this act the word "strike" shall mean the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment. Nothing contained in this act shall be construed to limit, impair or affect the right of any public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment."

The current no-strike provision, M.C.L.A. Sec. 423.201 (West's Michigan Legislative Service 1973 at 82) is not significantly different from the earlier version.

Except for the 1965 addition of the word "concerted" before the words "failure to report for duty . . ." apparently in order to make Sec. 1 parallel Sec. 6 (see infra, n. 52), neither the 1965 nor the current provision is significantly different from the Hutchinson Act's prohibition, P.A. 1947, No. 336, Sec. 1. The constitutionality of Sec. 1 was upheld in City of Detroit v. Division 26 of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, 332 Mich. 237, 51 N.W.2d 228 (1952). The constitutional authority of the state to prohibit public employee strikes is not an issue in the case presently before the court.

BLEED THROUGH

between economic strikes and unfair labor practice strikes — and federal labor law certainly draws such distinctions, see, e.g., Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270 (1956), the Act leaves substantial doubt as to whether the unfair labor practice strike falls within the statutory prohibition. No Michigan cases directly on this point have been cited to this court, or found.[51]

Under the provisions of the original Hutchinson Act, a public employee was "deemed to be on strike" when he engaged in *any* concerted work stoppage, regadless of its purpose. P.A. 1947, Sec. 6. Discharge of striking employees was mandatory, automatic, and immediate, with the strikers losing all pension and retirement benefits in addition to their jobs. Id. Sec. 4. However, the discharged employee was entitled, on request, to a hearing before the public employer wherein he could establish that he did not violate the provisions of the Act. Id. Sec. 6. Because discharge was legally automatic and immediate at the commencement of the strike, the hearing was necessarily held after discharge. The employee could have an adverse decision reviewed by the Labor Mediation Board. Id. Illegal strikers could be re-employed by the public employer, but their salary on re-employment was limited by law, and they were placed on a two-year statutory probation. Id. Sec. 5.

The 1965 amendments, P.A. 1965, Nos. 379, 397, significantly altered the scheme. While retaining the basic prohibition on strikes by public employees, the amendments

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[51] It can be argued that by not specifically including unfair labor practice strikes within the express prohibitions of P.E.R.A., Secs. 1 and 6, the legislature intended to legalize or permit such strikes. On the other hand, it may also be argued that P.E.R.A. contemplates no distinction between economic and unfair labor practice strikes, or that if unfair labor practice strikes are outside the statute, then the common law prohibition on such strikes applies.

repealed those provisions requiring the discharge of strikers and limiting the terms of their re-employment. The employer was given the option of imposing no discipline on illegally striking employees, or of imposing any appropriate discipline up to and including discharge.[52]

The 1965 amendment retained the basic Section 6 employee right to a hearing before the employer in the event of a work stoppage and the employer's actual or proposed exercise of the power to discipline or discharge. However, at least three important changes were made. First, whereas under the old Section 6 and employee was deemed to be on

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[52] The 1965 version of Sec. 6 of P.E.R.A., which is still in effect, M.C.L.A. Sec. 423.206, reads as follows:

423.206 Same; deemed on strike; proceeding to determine violation of act; decision, review

Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discip ine such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record.

BLEED THROUGH

strike when he engaged in *any* concerted work stoppage, he now was deemed to be on strike only when he engaged in a concerted work stoppage *for the purpose of achieving economic goals.* This amendment had the effect of importing the basic ambiguity of P.E.R.A. with regard to unfair labor practice strikes into Section 6.

Second, while the original Act provided a discharged employee would "be entitled . . . to establish that he did not violate the provisions" of the Act, P.A. 1947, No. 336, Sec. 6, the amended version entitled the disciplined employee "to a determination as to whether he did violate the provisions" of the Act, with review of a decision adverse to the employee in the Court of Appeals, "for determination whether such decision is supported by competent, material and substantial evidence on the whole record." M.C.L.A. Sec. 423.206. The amended version contemplates a significant shift in the nature of the hearing before the employer. Originally, any concerted work stoppage created a rebuttable presumption that the employee was illegally striking, and the employee had the burden of asserting affirmative defense to negative this presumption. Under the new provision, the presumption of illegality is removed for the purposes of the hearing, and the employer is given the obligation of establishing an employee violation by competent and material evidence.

Finally, the 1965 repeal of the mandatory discharge provisions combined with changes in the language of Section 6 to eliminate the original definiteness as to the *timing* of the employer's discharge hearing. Under the 1947 Act, the hearing was necessarily after discharge. The 1965 version does not state explicitly whether the employer's hearing is to be before or after discharge, and the scheme of the amended Act can accommodate either alternative. M.C.-L.A. Sec. 423.206. It seems settled that Section 6 does not

preclude a post-discharge hearing, cf. School District for the City of Holland v. Holland Education Association, 380 Mich. 314, 157 N.W. 2d 206, 210 (1968), and no Michigan case has been found holding or even suggesting that the statute precludes a pre-discharge hearing. Although a hearing must be held by the employer on timely request, the *timing* of the hearing is within the discretion of the employer, so long as the hearing is commenced no later than ten days after the request.[53]

Discipline or discharge of striking employees is not the sole remedy available to public employers faced with a strike. The Supreme Court of Michigan has held that the state circuit courts have equity jurisdiction to enjoin strikes by public employees. However, injunctions are not to issue upon a mere showing that prohibited concerted activity has taken place. *Rather, under the usual principles of equity, the circuit court should inquire as to whether there has been violence, irreparable injury, or breach of the peace, and, under the "clean hands" doctrine, whether the employer has bargained in good faith.*" School District for the City of Holland, *supra,* 157 N.W. 2d at 210, 211.

M.E.R.C. has no jurisdiction to remedy illegal strikes by public employees. This lack of jurisdiction, especially when coupled with the ambiguous position of the public employee unfair labor practice strike in Michigan law, sometimes puts M.E.R.C. in an awkward situation. For example, in the case before the court, the Union filed unfair labor practice charges against the public employer with M.E.R.C. on February 14, 1973, and went on strike on

[53] The court understands that it was on this interpretation of P.E.R.A. that the majority of the three-judge panel decided that the constitutionality of P.E.R.A. was not sufficiently implicated in this suit to require a three-judge court under 28 USC Secs. 2281, 2284.

BLEED THROUGH

February 15, 1973, allegedly solely to protect the employer's unfair labor practice. The employer terminated the striking employees for carrying on an economic strike as of March 5. A hearing was held before the M.E.R.C. Trial Examiner on March 19.[54] The Trial Examiner found for the employer on July 22,[55] and the full Commission likewise found for the employer on February 25, 1974.[56]

It is apparent that M.E.R.C. nominally had before it only the unfair labor practice charge against the employer, but that in reality an additionl issue was the legitimacy of the employees' strike.

If M.E.R.C. found that the employer had committed significant unfair labor practices, then the union could more plausibly argue to the courts and the public that its strike was not illegal and that in any case the equities were with its strike and the employees as the wronged parties. In this situation, M.E.R.C. would appear to be compromising the general legislative policy against public employee strikes, and infringing upon the jurisdiction of the public employer to determine the legality of a strike by its employees.[57] On the other hand, a finding of no unfair labor practice would be more apparently supportive of the general legislative prohibition on strikes, would make it much more difficult for the union to raise troublesome questions about the validity of unfair labor practice strikes, and would not appear to infringe upon or compromise the em-

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[54] M.E.R.C. Transcript.

[55] *Lake Michigan College*, No. C73 B-33, Decision and Recommended Order of Administrative Law Judge (July 2, 1973). Def. Ex. 4.

[56] Lake Michigan College, Case No. C73 B-33 (M.E.R.C. Feb. 25, 1974). Def. Ex. 9.

[57] Cf., Saginaw Township Bd. of Ed., 1970 M.E.R.C. Lab. Op. 127.

ployer's jurisdiction to determine the legality of the strike and the appropriate remedy, if any.

C.

The procedural history and present posture of this case are of some importance.

Plaintiffs filed their original complaint on April 6, 1973, alleging infringements of their Due Process rights by the defendants, and requesting a temporary restraining order and preliminary and permanent injunctive relief. This complaint was subsequently amended.

After a hearing, the single district judge to whom the case had been assigned issued a temporary restraining order. On appeal, the United States Court of Appeals for the Sixth Circuit ordered the temporary restraining order set aside and vacated.

Meanwhile, the defendants in this cause filed a motion for the convening of a three-judge court pursuant to 28 USC Secs. 2281 and 2284. In due course, the Chief Judge of the United States Court of Appeals for the Sixth Circuit convened such a court, stating that the three-judge court would have jurisdiction to determine whether a three-judge court was required in this case. After hearing arguments on the issue, the original three-judge panel did not finally decide that a three-judge court was required, but concluded that the matter should proceed before three judges, with a final decision to be made after all evidence and arguments had been submitted. Subsequently, one member of the three-judge panel excused himself and a substitute was appointed. A majority of this reconstituted panel then decided that the case was not required to be heard by three judges, on the grounds that "this is not a case in which an injunction is sought to restrain the opera-

BLEED THROUGH

tion of a state statute on the ground that it is repugnant to the United States Constitution but is instead an action for remedial relief for an allegedly unlawful discharge from employment. . . . "[58] Accordingly, an order dissolving the three-judge court and remanding the case to the single district judge was entered.

The district judge to whom the case was remanded had set on the original and reconstituted three-judge panels, and he dissented from the order to dissolve the three-judge court. He thought the P.E.R.A. might be sufficiently implicated in the case to require the special panel, and thus thought that three judges ought to hear the case and then make a final decision on the three-judge court issue. [59]

Because of the impact of 28 USC Secs. 2281 and 2284 on this case, the court cannot examine the constitutionality of P.E.R.A. itself, and does not presume to do so. Rather, the court confines itself strictly and narrowly to the facts of this particular case. The court does not reach or call into question the constitutionality of the state policy and statutory scheme of P.E.R.A.

A hearing on the merits was held on March 14 and 15, 1974. The court now turns to the basic legal issues before it.

II.

American government at all levels is carefully designed to be strong enough to serve its positive purposes, yet at the same time is constitutionally limited so that strong, positive government does not and cannot lead to tyranny.

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[58] Order Dissolving Three-Judge Court, App. B.

[59] Id.

The foundation stone of constitutional limitations is the Due Process Clause in the Fifth and Fourteenth Amendments of the United States Constitution. The Due Process Clause of the Fourteenth Amendment, specifically invoked by the plaintiffs here, provides, "No State shall . . . deprive any person of li^e, liberty, or property, without due process of law." The basic purpose of the Due Process Clause is to ensure that governmental action which affects important interests of citizens shall be objectively rational and substantially just, insofar as possible in this imperfect and complicated world. Thus, in appropriate cases, courts inquire as to whether particular governmental actions have a rational basis or whether they are arbitrary and capricious.

In its procedural dimension, the Due Process Clause assumes that governmental decisions affecting the interests of citizens will more often than not be rational and just when made by suitably objective persons following orderly procedures. This assumption rests on the faith that governmental officials will pursue a proper course of action if given a chance to do so. It is the product of many centuries of Anglo-American constitutional and legal development.

Because the Due Process Clause applies to such a wide variety of activities and situations, the question of whether the government has provided due process depends upon the circumstances of each individual case. The resolution of a Due Process issue necessarily involves the careful analysis of the various governmental and private interests involved, and the making of the most delicate and sensitive accommodations in light of the basic purposes of the Due Process Clause.

The case presently before the court concerns an employment dispute in the public sector. In some respects, public

BLEED THROUGH

employment disputes are no different from private disputes. *Certainly the ultimate interest of both employer and employee lies in keeping the agency or institution operating, and in this lies the basis for final compromise and agreement at contract time.*

However, the people and the legislature of Michigan apparently believe that the public sector is sufficiently different from the private to require the statutory proscription of strikes by public employees. It is presumed, rightly or wrongly, that the proscription is necessary to protect essential public services and because public agencies are neither imbued with the profit motive nor subject to the discipline of the market.[60] Moreover, some believe that a strike against a public employer is a symbolic attack upon the government and the public.

The legal proscriptions on strikes by public employees do not mean that public managers are given uncontrolled discretion over employee relations. On the contrary, quite apart from statutory relations, the concept of justice implicit in the Due Process Clause requires *that public managers assume an extra duty to act fairly and equitably with respect to the employees under their supervision. While a departmental budget may be gratifyingly low, the public's business will not be done efficiently if the employees are treated harshly and unfairly and are denied effective means of redress for their genuine grievances.* Of course, if an individual employee is truly inefficient,

[60] It is often assumed that the absence of a market in the public sector means the absence of a restraint on employees which is present in the private sector. However, the absence of such a market and of the profit motive also frees the public manager from pressures which in the private sector counsel flexibility and compromise in dealing with employees and unions. The stock in trade of the politicians who act as public employers is not money, or at least not their money, but power. Many contract demands and most strikes are challenges to politicians' power, and may be more stoutly resisted for this reason.

dishonest, or otherwise a poor worker, due process will not stand in the way of discipline or discharge.

It is especially important to the calculus of this case that public employees are not mechanical units which can be moved in and out of their positions with no substantial damage to themselves, their families, and the larger social groups of which they are a part. As Justice Douglas recently said, *"Employability is the greatest asset most people have," Sampson* v. *Murray,* 415 U.S. 61, 95 (1974) (dissenting opinion; emphasis supplied), and that is emphatically true of the teachers who are plaintiffs in the present case. In order to teach most subjects at Lake Michigan College, at least before February 1973, it was almost always necessary to have earned a master's degree or more. For most people, such advanced training can be acquired only with great expenditures of time and money. Moreover, such training is highly specialized, reducing to a substantial degree the ability of a person to move into new occupational fields, and increasing the person's *dependency* upon a rather narrow demand sector. This case arose in a period of high inflation and in a period of retrenchment for education nationally. Thus, as appeared at trial, several teachers who were discharged by the College in 1973 were unable to find suitable employment and were utterly ruined financially and grievously hurt psychologically. Any calculation of fundamental fairness in this case must take account of these human and economic realities.[61]

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[61] During the first part of the twentieth century, American courts read a "liberty of contract" into the Due Process Clause in order to strike down legislation designed to ameliorate the lot of workers who were grievously exploited by management. The assumption was that a single employee was in fact free and able to bargain effectively with

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BLEED THROUGH

With this general introduction, the court may move to a more detailed examination of the legal issues raised in this case.

A.

The Due Process guarantees of the Fourteenth Amendment protect, among others, liberty and property interests. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Arnett* v. *Kennedy,* 42 U.S.L.W. 4513 (April 16, 1974). In *Roth,* the Supreme Court set forth guidelines for the determination of whether plaintiffs possess protected property interests:[62]

> "Certain attributes of 'property' interests protected by procedural process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must ,instead, have a legitimate claim of entitlement to it. *It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.*
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their

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(continued from preceding page)

his corporate employer. As the century progressed, more and more people came to see that the courts' factual assumption was wrong, and that the constitutional law built on the theory of liberty of contract was bad law and bad policy. If this court were to ignore the human and economic realities of today's employment market, and assume a free or even moderately free job mobility, it would be repeating the mistakes of the early twentieth century.

[62] Liberty interests are discussed infra.

> dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577. (Emphasis supplied.)

Plainly, the Court recogniztd that the drafters of the Fourteenth Amendment did not intend that every person whose interests were touched by government should have a federal case merely because he believed himself aggrieved. On the other hand, the Court did not adopt an unduly narrow or crabbed interpretation of "property". When one has a claim of entitlement which is legitimated by some objective rule, understanding, or situation external to one's self, and which is created, fostered, or deliberately acquiesced in by the state, then he has a property interest protected by the Due Process Clause.

Do the plaintiffs in this case have a property interest which is protected by the Due Process Clause? Put somewhat differently, the issue is whether the Due Process Clause limits in any way the procedural means by which the state may enforce its public employee no-strike provisions against both tenured or non-probationary and non-tenured or probationary employees.

All the recent leading federal cases considering the extent of protected property interests of public employees have involved the disciplining or effective discharge of individual employees by administrators acting in the ordinary course of operations. *Roth, supra, Sinderman, supra; Arnett, supra; Orr* v. *Trinter,* 444 F.2d 128 (6th Cir. 1971); see also *Blair* v. *Board of Regents,* No. 73-1984 (6th Cir., May 3, 1974), and cases cited at 2.

BLEED THROUGH

However, an employment dispute which results in a strike by nearly all of an institution's employees is both quantitatively and qualitatively different from a situation involving only an individual employee. In Michigan, the legislature has established a framework for handling employment relations and disputes, including provisions for collective bargaining and provisions imposing rights and duties on both employers and employees. Most of these provisions apply whether or not a collective bargaining contract is in existence between the employer and the union, and irrespective of the tenure status of individual employees. In the case presently before the court, the tenure status of nearly all of the individual plaintiffs has little or no functional relationship to the merits of the dispute.[62a]

In *Arnett, supra,* Justice White summarized the results of prior cases: "[T]o determine the existence of the property interest, . . . one looks to controlling law. . . . " 42 U.S.L.W. at 4536. Justice White added that he understood that six members of the court agreed with this proposition. *Id.* Here, the "controlling law" is P.E.R.A. The court thus concludes that the appropriate reference is not the contractual tenure status of each individual employee, but the provisions of Michigan's Public Employment Relations Act.

[62a] Bates v. Dause, No. 73-2111 (6th Cir. Sept. 12, 1974), is also different from the present case. In Bates, two tenured public school principals who had verbally supported a strike by public school teachers received a disciplinary demotion to teaching positions. The disciplined employees challenged their demotion on First Amendment grounds, and also raised a pendent state law claim. There was no procedural due process claim in the case, nor did the Sixth Circuit consider the extent to teachers' protected property rights under the Due Process Clause.

Section 2 of P.E.R.A., M.C.L.A. Sec. 423.202, defines "public employee" as a "person holding a position by appointment or employment . . . in the public school service. . . . " The Michigan Supreme Court has applied this section to public school teachers at least twice. *School District of the City of Garden City* v. *Labor Mediation Board*, 358 Mich. 258, 99 N.W.2d 485 (1959); *School District of the City of Holland, supra.* In the first of these cases, a school district contended that the Labor Mediation Board had no jurisdiction to mediate salary disputes between the district and the teachers since there was no written contract in effect. The Court rejected this argument. In *Garden City,* 99 N.W. 2d at 487-488. In the second of these cases, a teachers' union argued that because no contracts of employment were in force between the teachers and the district, the teachers could not be employees as a matter of law, and the no-strike provision of Section 6 could therefore not apply to them. The Court again rejected the argument. Citing *Garden City,* the Court said:

> "Since this Court concluded that there is jurisdiction to mediate grievances '*in advance* of the determination of salary provisions,' it follows that such jurisdiction would necessarily attach in advance of the *executing* of the written contracts themselves, which are required in the case of teachers, by the School Code.
>
> If teachers as we have held are subject to the provision of the Hutchinson Act dealing with the mediation of grievances *in advance* of signing written contracts, we can hardly hold with consistency that they are *not subject* to the no-strike provision of the same act for the same reason. We are constrained to hold that appellants were 'employees' within the terms of the act." School District for the City of Holland, 157 N.W.2d at 209.

BLEED THROUGH

Here, all parties agree that P.E.R.A. applies. Under the decisions of the Michigan Supreme Court, all the teachers are "public employees" irrespective of the existence or terms of a collective bargaining agreement, or of an "understanding," or if individual contracts or terms of employment. In order for P.E.R.A. to apply at all, and in order for Lake Michigan College to be able to proceed to discharge the teachers under the authority of P.E.R.A., the teachers must continue to be "public employees." Although before termination of a striking public employee will usually not enjoy all the benefits and prerequisites of normal employee status, by necessary implication of P.E.R.A., he retains a legitimate entitlement to his job and also an enforceable right to engage in protected concerted activities, M.C.L.A. Secs. 423.209, 423.210, 423.216.

All the plaintiffs in this case thus have property interests cognizable by the Due Process Clause. Any individual who is a "public employee" by statutory definition plainly has a cognizable property interest when an alleged violation of a substantive prohibition of the statute is sought to be redressed by a statutorily-authorized deprivation of the interest through discharge for cause.[63]

Under the circumstances of this case, a substantial number of teachers have a "property interest" sufficient to implicate the Due Process guarantees of the Fourteenth Amendment quite apart from P.E.R.A. As observed above, many of the teachers are highly trained and highly special-

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[63] This is to say only the procedural due process limitations apply to the state's enforcement of the substantive prohibitions of P.E.R.A. In the ordinary course of a school's administration where the focus is on individual teachers and there is no serious labor dispute, individual contracts and terms of employment remain significant in determining the existence of absence of a cognizable property interest. Roth, supra; Sinderman, supra.

ized. Such training was often originally required for employment at Lake Michigan College, and additional training was at least encouraged by the terms of the negotiated salary schedule. This training had the effect of reducing to a substantial degree the occupational mobility of the teachers. In addition, many of these teachers had a great deal of teaching experience, and many years of service to the public and to the College. Experienced, highly trained, professional teachers most certainly relied upon their jobs in their daily lives, and, under all the circumstances, had a legitimate expectation, induced by Lake Michigan College and the state, that their position and reliance would not be "arbitrarily undermined, but would, at a minimum, be protected by the procedural guarantees of the Constitution. *Roth, supra,* 408 U.S. at 577.

This discharge of the striking faculty as of midnight March 5, 1973, by the action of the Lake Michigan College Board of Trustees and administration was clearly a deprivation of the teachers' protected property interests.[64]

In addition to property, the Due Process Clause protects liberty. Liberty interest include a person's stake in his "good name, reputation, honor, or integrity," and his related ability to take advantage of employment opportunities. *Roth, supra,* 408 U.S. at 573.

It is clear in this case that the teachers' liberty interests are strongly implicated. The teachers are accused of break-

[64] Although all the discharged teachers are entitled to a fair hearing on the issue of whether their conduct was illegal under P.E.R.A., a finding that their conduct was not illegal will not necessarily entitle all teachers to the same remedy. Since the scope of the remedy relates to the scope of the deprivation, those teachers on probationary status at the time of the discharge may be entitled to lesser relief than the full status teachers.

BLEED THROUGH

ing state law, and Lake Michigan College has already imposed the maximum penalty allowed by law, forfeiture of their jobs. In a society which values law and order, a finding by a state agency that a person has broken the law is *per se* an infringement of the person's interests in his "good name, reputation, honor, or integrity," and is in itself a stigma which strongly tends to foreclose his freedom to take advantage of other employment opportunities, at least where the finding is widely publicized and is coupled with the imposition of a severe statutorily authorized penalty.[65]

The court finds that the defendants' accusations against and discharge of the teachers in this case constitute a deprivation of the teachers' protected liberty interests.

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[65] In Blair, supra, the United States Court of Appeals for the Sixth Circuit held that the failure of a school system to renew the contract of a teacher on grounds of failure to meet minimum standards in his relationships with students did not so implicate his liberty interests as to require a hearing under the Due Process Clause. However, the present case is clearly distinguishable from Blair, since there the discharged teacher was not charged with breaking the law. Also, Blair was a "one-to-one" relationship and not a group employment problem.

In a dictum in Roth, supra, the Supreme Court said of the hearing required when a state deprives a person of a liberty interest, "The purpose of such . . . hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may deny him future employment for other reasons." 408 U.S. at 573, n. 12. The implication is that when a person is discharged on a basis which infringes his liberty interest, he is entitled to a hearing at which he may establish the falsity of the charges against him. If he does establish his innocence, then he must be reinstated unless the employer has other substantial and clearly distinct reasons for discharging him.

B.

Where the state seeks to deprive a person of protected liberty or property interest, it must provide the person with an opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). As in other cases, where the deprivation is by a state agency or administrative unit, *"an impartial decision maker is essential." Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970); see also, *Pickering* v. *Board of Education*, 391 U.S. 563, 578-579 n. 2. (1968); *Morrissey* v. *Brewer*, 408 U.S. 471, 485-488 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564, 578-579 (1973); *Arnett, supra*, 42 U.S.L.W. at 4540 (White, J., concurring opinion); *cf., Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 36-45 (1950). (Emphasis suplied.)

In this case, very serious factual issues are to be resolved by the administrative tribunal. The teachers are accused of breaking the law, and the tribual must determine whether each teacher engaged in a work stoppage in concert with others "for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment." M.C.L.A. Sec. 423.206. The legal position of the unfair labor practice strike in P.E.R.A. is also implicated. Clearly, considering the importance of the deprivations involved and the nature of the issues to be decided, the teachers are entitled to an *impartial decision maker.*

Where the issue is whether a particular tribunal is impartial, the Supreme Court usually does not itself make or otherwise mandate an initial inquiry into the existence of actual bias. Rather, starting from basic assumptions concerning ordinary human nature, the Court examines institutional patterns and personal involvement and inter-

BLEED THROUGH

ests to determine whether, under the circumstances, a constitutional "presumption of bias" attaches. If it does, then the decision maker is ordinarily disqualified. *Ward* v. *City of Monroeville,* 409 U.S. 57, 61 (1972). As Justice Black wrote for the Court:

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey* v. *Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14.
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> In Re *Murchison,* 349 U.S. 133, 136 (1955).

More generally, Justice Frankfurter once observed that "a democratic government must . . . practice fairness; and *fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.*" *McGrath, supra,* 341 U.S. at 170 (concurring opinion) (emphasis supplied.)

It is arguable that under the circumstances of the case presently before the court, the constitutional presumption

of bias attaches and that it requires the disqualification of the defendants as decision makers. However, the court does not consider and does not reach the question of the presumption of bias because it believes it is precluded from doing so by its truncated jurisdiction. P.E.R.A. states that the termination hearing is to be held by the "officer or body having power to remove or discipline" the striking employee. M.C.L.A. Sec. 423.206. Although all educational and other governmental institutions in Michigan are not similar to Lake Michigan College in size and division of authority, a substantial number are. If this court attempted to grant injunctive relief on the basis of a finding that the presumption of bias ought to attach because of institutional factors, the court would most probably be outside its jurisdiction. 28 USC Sec. 2281.

Accordingly, the court asks only whether the Lake Michigan College Board of Trustees is actually biased as a matter of fact under the circumstances of this case. The court expresses no opinion as to whether the Board of Trustees might be disqualified for bias in any case other than the one presently before the court.[66]

In order to determine whether the defendants are actually biased in this case, the court has had to explore many of the matters canvassed by M.E.R.C. in connection with the plaintiffs' unfair labor practice charge against the defendants. Of course, this court has no jurisdiction to review M.E.R.C.'s decisions, and does not do so. It is obvious that although they overlap the questions of actual

[66] The plaintiffs have requested back pay. Assuming such an award is in the nature of damages, one subject of inquiry is whether the defendants have acted in good faith. Pierson v. Ray, 386 U.S. 547 (1967). All or nearly all of the factual elements having a bearing on the issue of actual bias also have a bearing on the issue of "good faith."

BLEED THROUGH

bias and of unfair labor practices are substantially different. An employer might be guilty of an unfair labor practice and still be unbiased under the Due Process Clause. The converse might also be true.

The court notes parenthetically that although Michigan law gives M.E.R.C. exclusive jurisdiction over the issue of employer unfair labor practices under P.E.R.A., a state court may inquire as to the fairness of an employer's labor practices on general equitable principles when a case requires it. *School District for the City of Holland, supra.* The question of bias is properly before this court, and to the extent that the court examines some of the same factors that M.E.R.C. has previously explored, the court is merely following a course established in Michigan law.

Bias is a state of mind, a mental attitude or orientation with respect to specific parties in a specific situation. Where the concern is with future action, the question of bias is largely coincidental with that of motive. The existence of bias, like the existence of other states of mind, can only be inferred from observable acts and situations. Although some bias arise from acquired and relatively constant prejudices towards groups or classes of people, one form of bias is an ad hoc occurrence, the produce of special "circumstances and relationships." Cf., *Murchison, supra,* 349 U.S. at 136. It is the latter type of bias which is allegedly present in this case. The court must determine from an examination of the circumstances and relationships of the parties whether the Lake Michigan College Board of Trustees is biased, or whether it is capable of objectively evaluating the evidence in the proposed P.E.R.A. hearing on the subject of the legality of the teachers' work stoppage.

The court has found, *supra*, that in early February 1973, the College acted with the ultimate goal of breaking the Union and with the immediate goal of provoking the strike which began on February 15, 1973.[67] After the strike began, the College embarked upon a program to finally discharge the striking teachers as a part of the plan to break the Union, and the College has not deviated from this course since. Not only did the College finally discharge the striking teachers, but it also hired permanent replacements. Even in the absence of any plan to break the Union, the College's commitment to the permanent replacements gives it a stake in upholding the discharge of the striking teachers.

Under these circumstances, the court concludes that the College Board of Trustees is actually biased against the striking teachers, and is utterly incapable of rendering a

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[67] In Local 155 of the International Molders and Allied Workers Union, AFL-CIO v. N.L.R.B., 442 F.2d 742 (D.C. Cir. 1971), the Court upheld the N.L.R.B.'s finding that the employer's withdrawal of benefits for the purpose, among others, of precipitating a strike at a time favorable to the employer was inherently prejudicial to the Union's statutorily protected rights, and thus a violation of the N.L.R.A. Secs. 8(a)(1) and 8(a)(3), as well as a failure to bargain as required by Sec. 8(a)(5). This was true even though the *sole* purpose of the withdrawal of benefits was not to induce a strike, and even though a strike did not in fact occur. The court reasoned that Section 7 of the N.L.R.A. "protects not only the exercise of the right to strike but also the right to refrain from its exercise." 442 F.2d at 747.

This court observes parenthetically that while the teachers in this case have no right to strike, it may be argued that they have a protected First Amendment associational right not to strike, and that they have such a protected right under P.E.R.A. Certainly it is reasonable to argue that the prohibition on striking necessarily implies a protected right not to strike, and that this protected right qualifies the public employer's freedom not to offer concessions just as the protected right qualifies a private employer's right under the N.L.R.A. to use economic coercion. The qualification of the employer's right not to make concessions seems consistent with the public employer's Due Process obligation to be fundamentally fair to employees.

BLEED THROUGH

fair and objective judgment on the difficult factual and legal questions of whether the teachers violated the provisions of P.E.R.A.

Since the Board is actually biased against the teachers, it cannot, consistently with the requirements of the Due Process Clause, try the teachers.

It is true that if the Board held P.E.R.A. hearings, those teachers who received adverse decisions could take appeals to the circuit court, which is empowered to review for substantial evidence. M.C.L.A. Sec. 423.206. However, this does not alter the disqualification of the Board, since the teachers are entitled to an impartial tribunal in the first instance, even when a trial *de novo* is provided. *Tumey* v. *Ohio,* 273 U.S. 510, 533 (1927); *Ward, supra,* 409 U.S. at 61; *Gibson, supra,* 411 U.S. at 577 n. 16; cf., *Pickering, supra,* 391 U.S. at 578-579, n. 2; *Armstrong, supra,* 380 U.S. at 551-552.

Of course, the disqualification of the College Board does not mean that the teachers were legally on strike and that their discharge was wrongful. This must still be determined. Fortunately, Michigan makes broad allowance for declaratory judgment actions to try such questions as the legality of the teachers' work stoppage where resort to the designated administrative tribunal would be a useless or futile effort for one party. Mich. GCR 1963, 111.1, 521; *Welfare Employees Union* v. *Michigan Civil Service Commission,* 28 Mich. App. 343, 184 N.W.2d 247, 250 (1970); *Elby* v. *Livernois Engineering Co.,* 37 Mich. 252, 194 N.W. 2d 294, 430 (1972); cf., *Gibson, supra,* 411 U.S. at 575.

Accordingly, an injunction will issue requiring the defendants to file a declaratory judgment action in the Michigan Circuit Court for the Second Judicial Circuit seeking a declaration that the discharged teachers, plaintiffs in this

case, were illegally on strike within the meaning of P.E.R.A. at the time of their discharge. The teachers at that time may raise whatever defenses or equities of fact or law they have, and they may seek a proper construction of the statute. See *Smigel* v. *Southgate Community School District,* 388 Mich 531, 202 N.W. 2d 305, 306 (1972).[68]

This court will retain jurisdiction of this case pending the outcome of the declaratory judgment action in the state courts. If the state courts decide that the teachers were illegally on strike, then the discharges by the College will have been justified. If the state courts find that the teachers were not illegally on strike, then the full status teachers, at least, will be entitled to reinstatement and damages.[69]

The defendants contend that the Norris-LaGuardia Act, 29 USC Sec. 101 *et seq.* deprives this court of jurisdiction to grant injunctive relief (specifically reinstatement) to the plaintiffs in this case.

The court finds that Congress did not intend the Norris-LaGuardia Act to limit the power of federal courts to grant injunctive relief when it is called for under the Four-

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[68] For example, the plaintiffs might argue that they had probable cause to believe and in fact did believe that the defendants' arbitrary, capricious, unreasonable and provocative conduct amounted to an unfair labor practice, and that they were not in fact on strike for economic purposes within the meaning of P.E.R.A. Certainly, the plaintiffs might argue, it would be unjust to require them to anticipate that the defendants' conduct would be deemed fair by M.E.R.C. Cf., Pierson, supra, 386 U.S. at 557. After M.E.R.C. made its determination, of course, the teachers were bound to return to work immediately. However, they had made an unconditional offer to return long before M.E.R.C. had decided that the College had acted fairly.

[69] The court reserves ruling on the scope of the remedy to which discharged probationary employees may be entitled.

BLEED THROUGH

teenth Amendment and its implementing statutes. Reviewing Congress's statement of purposes in Sec. 2 of the Norris-LaGuardia Act, 29 USC Sec. 102, the Supreme Court observed, "These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees." *United States* v. *United Mine Workers,* 330 U.S. 258, 274 (1947). The Court went on to hold that the Act did not apply to situations in which the United States was an employer. *Id.* at 276. Although United Mine Workers applied specifically to the federal government, many of the same elements of statutory language and legislative history indicate just as clearly that the Act was also not intended to extend to public employment situations on the state and local levels. The plaintiffs' cause of action is based squarely on the Fourteenth Amendment and its implementing statutes, which apply to the defendants here. The court can find no evidence that Congress intended to apply the Fourteenth Amendment to the states in every situation except public employment disputes in which injunctive relief is appropriate.

Accordingly, the court holds that the Norris-LaGuardia Act does not apply to limit the authority of this court to grant injunctive relief in this case.

In regard to the issue of damages, under 42 USC Sec. 1983, the court finds that the defendants have not established their defense of good faith, *Pierson, supra,* and that the defendants acted in bad faith in provoking the strike and discharging the teachers with the ultimate aim of breaking the Union.

C.

The plaintiffs have also alleged that the Due Process Clause require the College to hold a full evidentiary hearing before finally discharging the teachers.

The Supreme Court recently dealth with the issue of the timing of a discharged public employee's evidentiary hearing. *Arnett, supra.* Although a majority could not agree upon an opinion, the Court ruled that the Due Process Clause of the Fifth Amendment does not require a full evidentiary hearing before the discharge of a non-probationary government employee, at least where certain safeguards are provided to minimize the risk of error, *Id.* 42 U.S.L.W. at 4531-4532 (Powell, J., concurring opinion). While the teachers here were not formally accorded all the protections granted a discharged federal employee, they were not thereby prejudiced. The College was certainly aware of the teachers' position, and the teachers were not precluded from making further written presentations. Although the absence of specific back pay provisions from P.E.R.A. may have the effect of unconstitutionally depriving the plaintiffs of safeguards against error, the court cannot inquire into this question because of its narrow jurisdiction.

The court concludes that under the circumstances the failure of the College to give the teachers a full evidentiary hearing before discharge was not a violation of the Due Process Clause.

BLEED THROUGH

III.

It Is Ordered that an injunction issue restraining the defendants, or any of them, from holding hearings pursuant to M.C.L.A. Sec. 423.206 to determine the legality of the plaintiffs' work stoppage which commenced on February 15, 1973, or to determine the validity of the defendants' discharge of the plaintiffs as of midnight March 5, 1973.

It Is Further Ordered that the aforesaid injunction will require the defendants to file within thirty days of the issuance of the injunction an action in the Michigan Circuit Court for the Second Judicial Circuit seeking declaration pursuant to Mich. GCR, 1963. 111.1, 521, that the teachers who were discharged from the employment of Lake Michigan College as of midnight March 5, 1973, and who are plaintiffs in this case, were at the time of discharge illegally on strike within the meaning of the Michigan public employment relations statutes, M.C.L.A. Sec. 423.201 *et seq.*, M.S.A. Sec. 17.455(1) *et seq.;* and during which declaratory judgment action the plaintiffs in this case may raise whatever defenses or equities of fact or law they have. The injunction will also require the defendants to file with this court a copy of their bill of complaint in the state circuit court and a certified copy of any judgment or final order on the merits rendered by the state courts in the aforesaid declaratory judgment action after the termination of appeals, if any.

It Is Further Ordered that this court shall retain jurisdiction of this cause.

Dated: September 27, 1974.

Noel P. Fox
Chief District Judge

APPENDIX D

INJUNCTION

United States of America
In the District Court of the United States
For the Western District of Michigan
Southern Division

(Filed September 27, 1974)

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Lake Michigan College Federation of Teachers and Edward Shaffer, individually and as representative of other individuals similarly situated and too numerous to conveniently be here set forth,
Plaintiffs,

v.

Lake Michigan Community College, a public education institution established under the laws of the State of Michigan, et al.,
Defendants.

K-49-73 C.A.

The defendants, or any of them, are hereby enjoined and restrained from holding hearings pursuant to M.C.L.A. Sec. 423.206 to determine the legality of the plaintiffs' work stoppage which commenced on February 15, 1973, or to determine the validity of the defendants' discharge of the plaintiffs from the employment of Lake Michigan College as of midnight March 5, 1973.

The defendants are hereby enjoined and required to file within thirty days of the issuance of this injunction an

BLEED THROUGH

action in the Michigan Circuit Court for the Second Judicial Circuit seeking a declaration pursuant to Mich. GCR 1963, 111.1, 521, that the teachers who were discharged from the employment of Lake Michigan College as of midnight March 5, 1973, and who are plaintiffs in this case, were at the time of discharge illegally on strike within the meaning of the Michigan public employment relations statutes, M.C.L.A. Sec. 423.201 *et seq.*, M.S.A. Sec. 17.455(1) *et seq.*; and during which declaratory judgment action the plaintiffs in this case may raise whatever defenses or equities of fact or law they have. The defendants are also enjoined and required to file with this court a copy of their bill of complaint in the state circuit court and a certified copy of any judgment or final order on the merits rendered by the state courts in the aforesaid declaratory judgment action after the termination of appeals, if any.

Dated: September 27, 1974.

Noel P. Fox
Chief District Judge

APPENDIX E

OPINION AND ORDER

United States of America
In the District Court of the United States
For the Western District of Michigan
Southern Division

(Filed September 27, 1974)

Lake Michigan College Federation of Teachers and Edward Shaffer, individually and as representative of other individuals similarly situated and too numerous to conveniently be here set forth, Plaintiffs,	K-49-73 C.A.
v.	
Lake Michigan Community College, a public education institution established under the laws of the State of Michigan, et al., Defendants.	

The complaint in this case was filed on April 6, 1973. After the complaint had been amended once, this court, granting the motion of the plaintiffs, ordered that Robert P. Small, Richard Gates, Bernard Raddy, Donald Appleheimer, Emily Foster, Earl Place, Victor Weir and Dr. James Lehman be added as individuals and in their official representative capacity as members of Lake Michigan College Board of Trustees and President of said College as parties defendant.

BLEED THROUGH

Subsequently, on October 11, 1973, the added individual parties defendant moved the court to dismiss the case as to them in their individual capacities. The grounds advanced were that the amended complaint (1) failed to allege any individual acts committed by the added individual parties defendant, and (2) failed to allege that any individual defendant did not act in good faith, but instead acted in a malicious fashion toward the plaintiffs.

The plaintiffs opposed the motion, contending that the allegations in the amended complaint sufficiently alleged individual acts of bad faith committed by the individual defendants in question. Apparently as a precautionary measure, the plaintiffs also moved the court for leave to amend paragraph 9 of their amended complaint to specifically allege that each of the members of the Board of Trustees individually committed acts of bad faith.

At trial, the court denied the defendants' motions and said that it would state its reasons in an opinion and order.

The plaintiffs' motion to amend their complaint was related to the defendants' motion, and is also ruled upon in this order.

I.

Because of judicial and legislative efforts to accommodate the fundamentally irreconciliable, the theories of liability and the attendant rules of pleading under the Fourteenth Amendment and its implementing statutes are anything but simple. Something like the common law rules of real property, much Fourteenth Amendment law has been declared on a case-by-case basis until an elaborate and rather improbable system has been created.

It is elementary that a plaintiff stating a claim under the Fourteenth Amendment and its implementing statutes must allege official or state action, as distinguished from purely private, individual action. For example, a uniformed, on-duty policeman who gratuitously shoots and kills his unarmed, immobilized prisoner has deprived the prisoner of his life without due process of law. State action is present because the policeman acted under color of law and the policeman is accordingly liable under the Fourteenth Amendment and its implementing statutes. In contrast, the same policeman who, out of uniform and off duty, shoots and kills his brother-in-law during a domestic dispute has acted in his purely individual capacity. State action is not present and the policeman, though he may be criminally liable under state law, has not committed an offense under the Fourteenth Amendment.

In the case presently before the court, the relevant actions of the College Trustees and administrative officers were all performed in their official capacities, and the plaintiffs are not understood to have alleged otherwise. Indeed, an allegation of wrong by purely private, individual action could not be the foundation for an action in this court under the Fourteenth Amendment and its implementing statutes.

Unfortunately, the matter does not stop there. Although the Fourteenth Amendment on its face limits states, and would seem *pro tanto* to have repealed the Eleventh Amendment and to have overriden judicially-declared doctrines of sovereign immunity, neither Congress nor the courts has been willing to give the Amendment such a broad scope. Instead, both the legislative and judicial branches have created a series of limitations on the reach of the Amendment, limitations which are given effect through the application of one of several overlapping doctrines.

BLEED THROUGH

At least in the absence of specific Congressional legislation, a state cannot be sued directly for violation of the Fourteenth Amendment. See *Ex parte Young,* 209 U.S. 123, 150 (1908). Rather, the aggrieved party sues the individual government officer on account of the alleged wrong. The theory is that an unconstitutional action, although performed under color of law, cannot be an act of the state, but only the lawless act of the individual. Thus, in *Young,* which was an action to enjoin Minnesota's Attorney General from enforcing an allegedly unconstitutional railroad rate statute, the Supreme Court said:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants in a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the port of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and *he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.*" *Id.* at 159-160. (Emphasis supplied.)

Even at the time (1908), Young represented no departure from tradition. *Poindexter* v. *Greenhow,* 114 U.S. 270 (1885), involved a suit against a tax collector who had refused bond coupons in payment of taxes, and who, under the authority of a void law, had seized the property of the

plaintiff taxpayer for non-payment of taxes. In holding that a suit against the tax collector was not a suit against the state, the Supreme Court said, "That which . . . is unlawful because made so by the supreme law, the Constitution of the Unittd States, is not the word or deed of the State, but is *the mere wrong and trespass of those individual persons who falsely speak and act in its name.*" *Id.* at 290. (Emphasis added.)

The Supreme Court has recently reiterated these settled principles in *Scheuer* v. *Rhodes,* 42 U.S.L.W. 4543 (April 17, 1974). The survivors of those students who were killed by the Ohio National Guard at Kent State in 1970 brought an action for damages under 42 U.S.C.A. Sec. 1983 against the Governor of Ohio, the Adjutant General, and other state officials. Citing *Poindexter* and quoting *Young,* the Court held that the plaintiffs could bring an action "seeking to impose individual and personal liability on the *named defendants* for what they claim . . . was a deprivation of federal rights by these defendants under color of state law." 42 U.S.L.W. at 4545 (emphasis in original). See also, *Edelman* v. *Jordan,* 42 U.S.L.W. 4419 (March 25, 1974).

Whatever the relation in the Eleventh Amendment to the suit presently before the court, it is settled that under 42 U.S.C.A. Sec. 1983, the named defendants may be personally and individually liable at law and in equity for their unconstitutional acts committed under color of state law. The individually named defendants are certainly proper parties to this suit. Sec. 1983 applies specifically to "persons" acting under color of law, and it can hardly be contended that the named defendants are not persons. Although the plaintiffs must plead state action, this court can see no reason for requiring plaintiffs to separately

BLEED THROUGH

plead that the named defendants wronged them by acting in both their "representative" and "individual' capacities. If the judgment of the court is that the named defendants committed an offense against the plaintiffs under 42 U.S.C.A. Sec. 1983, then in the absence of a good defense the defendants are liable individually.

Of course, the plaintiffs do have a minimum burden of pleading which must be met. The Federal Rules of Civil Procedure require a plaintiff to include "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.Civ.P. 8(a)(2). The purposes of the rules of pleading are fulfilled if the pleader gives the opposing parties adequate notice of the claim against them.

Under the circumstances of this case it can hardly be alleged that the plaintiffs have not given the added individual parties defendant adequate notice of the claim against them. The added individual parties defendant are the President of the Lake Michigan Community College and members of its Board of Trustees. An allegation of action by the "Board of Trustees" or by the College plainly comprehends action by the members of the Board of Trustees, or the College's chief executive officer. The allegation that the actions in question were unconstitutional is all that is additionally necessary.

II.

The defendants have also moved to dismiss the case as to the named defendants in their individual capacities because the plaintiffs failed to allege that any individual defendant did not act in good faith. The plaintiffs responded with a motion to amend their amended complaint to make such an allegation.

In a Section 1983 action for damages, the Supreme Court has held that the defense of good faith was available to

defendant policemen who had arrested plaintiffs under a statute later held to be unconstitutional. *Pierson* v. *Ray*, 386 U.S. 547 (1967). Courts have allowed the "good faith" defense to be asserted in mitigation of damages in a variety of circumstances.

However, no case has been found in which the plaintiff was required to specifically plead "bad faith" as part of his cause of action. The Supreme Court has expressly held that the plaintiff need not plead, much less establish, "specific intent" in a Section 1983 action. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). In *Scheuer, supra*, the Supreme Court restated the rule that "good faith" is a *defense* under Section 1983. 42 U.S.L.W. at 4547-4548; see also, *Id.* at 4545 n. 4.

The court concludes that the plaintiffs need not specifically plead "bad faith" on the part of named individual defendants in order to state a claim upon which relief can be granted under Section 1983.

If the court thought the plaintiffs' pleadings deficient, it would certainly grant the plaintiffs' motion for leave to amend. However, since the court concludes that the amended complaint is presently sufficient and states a claim upon which relief may be granted, as against the added individual parties defendant, this is unnecessary.

III.

It Is Therefore Ordered that the defendants' motion to dismiss the complaint as against the added individual parties defendants is denied.

It Is Further Ordered that the plaintiffs' motion for leave to amend Paragraph 9 of their amended complaint is hereby denied.

Dated: 9/27/74

/s/ Noel P. Fox
Chief District Judge

BLEED THROUGH

APPENDIX F

DECISION

Nos. 74-2323 and 74-2324

United States Court of Appeals
For the Sixth Circuit

— — — — —

Lake Michigan College Federation of Teachers and Edward Shaffer, Individually and as Representative of Other Individuals Similarly Situated and Too Numerous to Conveniently Be Here Set Forth, *Plaintiff-Appellees,* v Lake Michigan Community College, a Public Education Institution Established Under the Laws of the State of Michigan, et al., *Defendants-Appellants,* and Frank J. Kelley, Attorney General of the State of Michigan, *Defendant-Intervenor-Appellant.*	On Appeal from the United States District Court for the Western District of Michigan

Decided and Filed July 2, 1975.

Before Phillips, Chief Judge, Miller, Circuit Judge, and Cecil, Senior Circuit Judge.

Phillips, Chief Judge. This appeal presents the recurring problem of due process rights of discharged teachers under *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The teachers here were employed by the Lake Community College (College), a public educational institution, and they were discharged in accordance with Michigan's Public Employment Relations Act (PERA), Mich. Stat. Ann. § 17.455(1) *et seq.,* for participating in an illegal strike. In an opinion reported at 390 F. Supp. 103 (W.D. Mich 1974), the District Court concluded that the PERA termination procedures would not provide the teachers with due process, and it granted remedial relief against the College. We hold that in the circumstances of this case the striking teachers do not enjoy the protection of the due process clause and that, even if they do, the District Court incorrectly found the PERA procedurally deficient. Accordingly, we reverse and remand for dismissal of the complaint.

The Lake Michigan College Federation of Teachers (Union) is the collective bargaining representative of the College's faculty. The parties' most recent collective agreement was scheduled to expire in August 1972, and bargaining for a new contract began in February of that year. By early August 1972, most major issues had been resolved except faculty salaries. The Union demanded a 5.5% increase, and the College sought to avoid any increase for the 1972-1973 school year. At the request of the College, the Michigan Employment Relations Commission (MERC) appointed a mediator pursuant to tht PERA. Mich. Stat. Ann. § 17.455(7). The parties met with the mediator, but no agreement was reached. The collective agreement expired on August 12, 1972, and the faculty returned to work in the fall under a "day-to-day" understanding" between the College and the Union. The precise terms and general effect of this understanding are not

BLEED THROUGH

entirely clear. Apparently it implemented the new contract terms to which the parties already had agreed and carired over some of the provisions of the expired agreement. The District Court found that the day-to-day understanding contained an agreement by the faculty and the Union not to strike.

At the Union's request, MERC subsequently appointed a fact-finder, whose conclusions and recommendations are not binding on the parties. *See* Mich. Stat. Ann. §17.454(27). The fact-finder held hearings and on January 11, 1972, issued a report recommending acceptance of the Union's proposals. The College rejected the fact-finder's suggestions, and negotiations continued between the parties. In early February 1973, the College and the Union agreed on a one-year contract that did not include a general increase in salary levels. The faculty voted to reject this agreement. The College made further proposals that the Union found unacceptable, and on February 14, 1973, the Union filed unfair labor practice charges with MERC, alleging that the College had breached its duty under the PERA "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." Mich. Stat. Ann. § 17.455(5). The administrative law judge subsequently found in favor of the College and recommended that the Union's charges be dismissed. On appeal MERC agreed, concluding that the College "engaged in no more than hard bargaining and did not violate its duty to bargain in good faith. . . ." The Michigan Court of Appeals eventually affirmed MERC's decision. *Lake Michigan Federation of Teachers* v. *Lake Michigan College,* — Mich App. —, — N.W.2d —, No. 19816 (Mich. Ct. App., Apr. 28, 1975).

On February 15, 1973, almost all of the faculty went on strike. The College made several appeals to the striking

teachers to return to work, but most remained on strike. On February 27, 1973, the College notified all striking faculty members that their concerted action was illegal[1] and that if they did not return to work by March 5, 1973, their employment would be terminated in accordance with § 6 of the PERA, Mich. Stat. Ann. § 17.455(6).[2] On March 5,

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[1] Under the PERA, public employees are forbidden to strike. Mich. Stat. Ann. § 17.455(2). At the time this case arose, the word "strike" was defined as follows:

> As used in this act the word "strike" shall mean the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment.
>
> Mich. Stat. Ann. § 17.455(1).

[2] Mich. Stat. Ann. § 17.455(6) provides as follows:

> Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, willfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of emplyment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record.

BLEED THROUGH

1973, the College terminated the day-to-day understanding with the Union on the ground that the Union had breached the no-strike provision of the agreement. On March 6, 1973, the College notified the striking teachers of their termination and informed them that under § 6 of the PERA they could request a hearing to determine whether their conduct in fact violated the PERA. Many of the discharged teachers requested hearings, which were scheduled to begin in early April 1973 before three members of the College Board of Trustees. This litigation intervened, however, and none of the hearings has been held.

On April 6, 1973, the Union and the discharged teachers commenced this action in the District Colrt against the College. The complaint alleged that the striking teachers had been terminated in violation of the due process clause, and it sought reinstatement until such time as the College devised a termination procedure consistent with due process. The District Court conducted a hearing, and on April 30, 1973, it entered an order requiring immediate reinstatement of the plaintiffs and forbidding the College to hold termination hearings pursuant to the PERA. Shortly thereafter, this court granted a stay pending appeal and eventually vacated the Distrist Court's order as an abuse of discretion. *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College,* No. 73-1534 (6th Cir., July 9, 1973).

The case proceeded to trial on the merits, and on September 27, 1974, the District Court issued an exhaustive opinion and order granting injunctive relief to the plaintiffs. 390 F. Supp. 103. In essence, the court held that the discharge of the striking faculty was subject to the requirements of the due process clause because the teachers enjoyed a protected property interest in their employment

and because the terminations adversely affected the teachers' liberty as that term is used in the fourteenth amendment. The court further concluded that the hearing procedure established by the PERA was deficient in this case because the Board of Trustees was actually biased against the striking faculty and therefore could not render a decision with the impartiality requirtd by the due process clause. Accordingly, the District Court ordered the College to commence a declaratory judgment action in the appropriate Michigan Circuit Court to determine whether the discharged teachers in fact were on strike illegally within the meaning of the PERA. The College now appeals from the order of the District Court.

The safeguards of procedural due process apply only when a person is deprived of liberty or property, and plaintiffs cannot prevail here unless their discharge implicated one of these protected interests. In *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the Supreme Court set forth guidelines for determining when an employee has a property interest in continued public employment.

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

BLEED THROUGH

> Property interests, of course, are not created by the Constiution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
>
> 408 U.S. at 577.

In the case at hand, the District Court examined *Roth* and its progeny and reached the following conclusion:

> All the plaintiffs in this case thus have property interests cognizable by the Due Process Clause. Any individual who is a "public employee" by statutory definition plainly has a cognizable property interest when an alleged violation of a substantive prohibition of the statute is sought to be redressed by a statutorily-authorized deprivation of the interest through discharge for cause.[64]

---

[64] This is to say only that procedural due process limitations apply to the state's enforcement of the substantive prohibitions of P.E.R.A. In the ordinary course of a school's administration where the focus is on individual teachers and there is no serious labor dispute, individual contracts and terms of employment remain significant in determining the existence or absence of a cognizable property interest. Roth, supra; Sindermann, supra.

390 F. Supp. at 130-31 & n.64.

We disagree. The fact that the PERA authorizes termination of public employees who strike does not give raise to "a legitimate claim of entitlement" to continued employment within the meaning of *Roth*. Nor does a striking teacher's claim to public employment rise to the level of a protected property interest merely because the PERA requires the employer to follow certain procedures when dis-

charging the employee. See *Ring* v. *Schlesinger,* 502 F.2d 479, 487 (D.C. Cir. 1974); *Suckle* v. *Madison General Hospital,* 499 F.2d 1364, 1366 (7th Cir. 1974). If the PERA instills an expectation in public employees, it is that they will be terminated or otherwise disciplined according to specified procedures of they go on strike. The present case is fundamentally different from cases such as *Indiana State Employees Association* v. *Boehling,* 511 F.2d 834 (7th Cir. 1975), and *Young* v. *United States,* 498 F.2d 1211 (5th Cir. 1974), which involved comprehensive statutes or regulations that specifically delineated the grounds upon which certain public employees could be discharged. By contrast, the PERA contains no comprehensive catalogue of the substantive grounds for discharge, and it gives no assurances, conditional or otherwise, of continued public employment.

The distinction we draw here is supported by the Supreme Court's recent decision in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). There the relevant statute provided that certain public employees could be discharged "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501. Although there was no opinion of the Court in *Arnett,* a majority of the Justices agreed that the statute conferred upon the employees a legitimate claim of entitlement to continued employment that amounted to a property interest cognizable under the due process clause. The cornerstone of the decision in *Arnett* was the Government's statutory promise to its employees that they would retain their jobs in the absence of a specified cause for discharge. In the case at bar, however, the PERA contains no such promise. We are convinced that this statute does not give rise to a protected property interest in continued employment.

BLEED THROUGH

The Union and the faculty argue that entirely apart from the PERA a fourteenth amendment property interest was created by Article X of the collective bargaining agreement, which deals generally with job security. The District Court did not rely upon this rationale, and we find it unconvincing. The collective agreement expired on August 12, 1972, and Article X could have subsided only in the subsequent day-to-day understanding between the parties. However, before the teachers had been finally discharged, this understanding was terminated by the College in response to the strike, which was itself a substantial breach of the understanding. Once the understanding had been terminated, the teachers were left, as the District Court noted, with "no collective bargaining agreement, no collective understanding, and no signed, written, individual teachers' contracts in hand." 390 F.Supp. at 118 n.34. We conclude that neither the bargaining agreement nor the later informal understanding conferred upon the faculty members in this case a due process property interest in continued public employment.

The requirements of procedural due process also apply to the deprivation of a protected liberty interest, and again we turn to *Board of Regents* v. *Roth,* for guidance:

> There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be

> a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437. *Wieman* v. *Updegraff,* 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123; *United States* v. *Lovett,* 328 U.S. 303, 316-317; *Peters* v. *Hobby,* 349 U.S. 331, 352 (Douglas, J., concurring). See *Cafeteria Workers* v. *McElroy,* 357 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor or integrity" is at stake.
>
> Similarly, ther is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities.
>
> 408 U.S. at 573.

Thus it appears that due process safeguards would apply if the discharge of a teacher foreclosed future employment opportunities that otherwise would be open to him or if the grounds for the discharge tend to discredit the teacher's honesty or integrity or to damage his standing in the community. The federal courts have had many opportunities to refine and to apply the general guidelines set forth in *Roth.* For example, liberty interests are not implicated when a teacher is charged with failure to meet minimum standards in his professional relationship with students. *Blair* v.

BLEED THROUGH

Board of Regents, 496 F.2d 322 (6th Cir. 1974). Similarly, allegations of improper or inadequate performance do not constitute a deprivation of liberty within the meaning of the fourteenth amendment. *Abeyta* v. *Town of Taos,* 499 F.2d 323 (10th Cir 1974); *Shirck* v. *Thomas,* 486 F.2d 691 (7th Cir. 1973). It has been held that in certain circumstances even the charge of "incompetence, neglect of duty and malfeasance in office" does not amount to a deprivation of liberty under *Roth. Adams* v. *Walker,* 492 F.2d 1003, 1008-09 (7th Cir. 1974).

On the other hand, this court has held that labeling an unconvicted person as an active shoplifter does infringe upon a protected interest in liberty. *Davis* v. *Paul,* 505 F.2d 1180 (6th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3550 (Apr. 14, 1975). In addition, charges of mental illness, fraud, and untruthfulness all have been held to affect the discharged employee's liberty. *Lombard* v. *Board of Education,* 502 F.2d 631, 637-38 (2d Cir. 1974), *cert. denied.* 43 U.S.L.W. 3500 (March 17, 1975); *Huntley* v. *Board of Education,* 493 F.2d 1016, 1019 (4th Cir. 1974); *Hostrop* v. *Board of Junnor College Dist No. 515,* 471 F.2 488, 494 (7th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973).

Against this background, the District Court in the case at bar held that protected interests in liberty were infringed when plaintiffs were discharged for violating the state statute prohibiting strikes. The court explained its conclusion as follows:

> It is clear in this case that the teacher's liberty interests are strongly implicated. The teachers are accused of breaking state law, and Lake Michigan College has already imposed the maximum penalty allowed by law, forfeiture of their jobs. In a society which values law and order, a finding by a state agency that a per-

> son has broken the law is *per se* an infringement of the person's interests in his "good name, reputation, honor, or integrity," and is in itself a stigma which strongly tends to foreclose his freedom to take advantage of other employment opportunities, at least where the finding is widely publicized and is coupled with the imposition of a severe statutorily authorized penalty.
>
> 390 F. Supp. at 131.

We believe that the District Court erred in announcing a sweeping rule to the effect that whenever a person in accused of breaking a law, his fourteenth amendment liberty interests are implicated automatically. Some laws undoubtedly proscribe conduct that bears upon the honor, integrity, and reputation of those who engage in it. However, there are many laws, such as traffic regulations, that do not fit this description. Each case must be decided upon its own facts.

In the case at hand, the teachers were accused of violating Michigan's no-strike law, and we fail to see how this allegation discredited their honesty, morality, and integrity or damaged their standing in the community. The PERA provides no criminal penalties for illegal strikes. Furthermore, through their pickets and placards the teachers openly announced the fact that they were on strike. Apparently they did not believe that their conduct was dishonest or immoral or that it would seriously damage their reputation in the community. At trial three of the teachers testified that there was no hostile community reaction to their participation in the strike. Similarly, we see nothing in this record to indicate that by discharging the striking faculty, the College foreclosed other employment opportunities that were available to them. The Col-

BLEED THROUGH

lege favorably recommended several of the discharged teachers to prospective employers and generally assisted the teachers in their search for employment elsewhere. Many of the faculty members did succeed in obtaining other jobs, some of which were teaching positions. To be sure, plaintiffs lost their positions at the College, which may have made them less attractive to other employers, but in and of itself this does not amount to a deprivation of liberty. *Board of Regents* v. *Roth*, 408 U.S. 564, 574 n. 13 (1972). Plaintiffs have made no showing that a definite range of opportunities is no longer open to them, and accordingly their liberty has not been restricted within the meaning of *Roth*.

Although the foregoing discussion disposes of this case, we believe that there is a substantial alternative basis for the result we reach here. Even if it is assumed that the requirements of procedural due process were applicable in the circumstances of this case, we cannot agree that the termination hearings to be held by the Board of Trustees would fail to meet minimum constitutional standards.

In concluding that these hearings would be procedurally deficient, the District Court focused on the need for an impartial decision maker:

> In this case, very serious factual issues are to be resolved by the administrative tribunal. The teachers are accused of breaking the law, and the tribunal must determine whether each teacher engaged in a work stoppage in concert with others "for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges, or obligations of employment." M.C.L.A. Sec. 423.206. The legal position of the unfair labor practice strike in P.E.R.A. is also implicated. Clearly, considering the

> importance of the deprivations involved and the nature of the issues to be decided, the teachers are entitled to an *impartial decision maker*. 390 F. Supp. at 132.

Earlier in its opinion the court found that the College hoped to "break" the Union and that the Board's intransigence on the issue of salaries was "so provocative that it must be characterized as being violent, if not barbaric." 390 F. Supp. at 109. Accordingly, the court had little difficulty in concluding that the Board of Trustees was actually biased against the striking teachers and was "utterly incapable of rendering a fair and objective judgment on the difficult factual and legal questions of whether the teachers violated the provisions of P.E.R.A." 390 F. Supp. at 134. The District Court evidently based its finding of bias at least in part upon the nature and complexity of the issues that the Board would be required to decide. The court was particularly concerned with the status of the unfair labor practice strike under the law of Michigan.. The PERA could be interpreted as prohibiting only economic strikes, not work stoppages in protest of an unfair labor practice committed by the employer. Thus the Board of Trustees, in performing its duty to determine whether the teachers in fact had violated the PERA, would have to decide in which type of strike the teachers had engaged. This would put the Board in the anomalous position of deciding whether the College had committed an unfair labor practice, with the teachers' jobs hanging in the balance. Given the animosities that often accompany labor disputes and this interpretation of the PERA, it is not surprising that the District Court wished to find another forum for the termination hearings.

BLEED THROUGH

However, after the District Court's decision in this case the Michigan Supreme Court issued its opinion in *Rockwell* v. *Crestwood School District Board of Education*, 393 Mich. 616, 227 N.W.2d 736 (1975), which substantially undercuts the District Court's conclusion on the bias issue. *Rockwell* makes it clear that a strike by public employees is illegal even though the employer has committed unfair labor practices. *Id.* at 639, 227 N.W.2d at 746. More important, the case defines the nature and scope of a PERA termination hearing:

> A § 6 hearing is of limited inquiry. Its sole purpose is to determine whether the employer correctly identified the particular employee as a violator of the act's prohibition against striking. Since the hearing will ordinarily be conducted by the employer, as the officer or body having general disciplinary authority, a § 6 hearing is not an appropriate forum for the employee to assert in defense the employer's violation of the act. Allegations of or defenses premised upon employer misconduct are the exclusive province of the MERC to resolve upon the filing of an unfair labor practice charge.
>
> Even if it should be determined in § 6 hearings that particular teachers have violated the provisions of the PERA by striking and those determinations are sustained on review, if MERC orders reinstatement of striking teachers because it determines that this affirmative action will best "effectuate the policies of the act" and that determination is sustained on review, the teachers shall be reinstated.
>
> *Id.* at 640-641, 227 N.W.2d at 747.

Thus there will be no difficult factual or legal questions for the Board of Trustees to decide. The only issue will

be one of fact—whether a particular employee in fact participated in the strike. The Board's sole objective in conducting the PERA hearings is to ensure that innocent teachers were not mistakenly identified as strikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly. It is significant that both MERC and the Michigan Court of Appeals found that the College had not bargained in bad faith and was not guilty of any unfair labor practice. Moreover, even if the Board members were hostile toward the Union and the striking faculty, this animosity would hardly manifest itself in the form of an unfair decision against a teacher who did not participate in the strike. In view of *Rockwell,* the District Court's finding of bias cannot stand. Further, the statute (see n. 2) provides for a judicial review in the State Circuit Court from an adverse decision following a § 6 hearing.

The judgment of the District Court is reversed, and the case is remanded for dismissal of the complaint.

Costs are taxed against the Lake Michigan College Federation of Teachers.

BLEED THROUGH

APPENDIX G

ORDER DENYING PETITION FOR REHEARING

NO. 74-2323-24

In The United States Court of Appeals
For the Sixth Circuit

(Filed August 14, 1975)

Lake Michigan College Federation of Teachers and Edward Shaffer, Individually and as Representative of Other Individuals Similarly Situated and Too Numerous To Conveniently Be Here Set Forth,

Plaintiff-Appellees,

v

Lake Michigan Community College, a Public Education Institution Established Under the Laws of the State of Michigan, et al,

Defendants-Appellants,

and

Frank J. Kelley, Attorney General of the State of Michigan,

Defendant-Intervenor-Appellant.

Before Phillips, Chief Judge, Miller, Circuit Judge, and Cecil, Senior Circuit Judge.

No Judge of this Court in regular active service having voted for re-hearing *en banc,* the petition for re-hearing has been considered by the original hearing panel.

Upon consideration, it is ordered that the petition for re-hearing be and hereby is denied.

Entered by order of the Court.

/s/ John P. Hehman,
Clerk

APPENDIX H

Affidavit of Mark H. Cousens

State of Michigan
County of Oakland—ss.

Mark H. Cousens, of the law firm of Fieger, Golden & Cousens, being first duly sworn, deposes and says that he was present at the Section 6 hearings involving the dismissal of all the teachers of Crestwood School District. These dismissals are the subject matter of *Rockwell* v. *Crestwood School District,* 393 Mich 616 (1975); US *App Pending.*

I represented one of the dismissed teachers at a Section 6 hearing held on Wednesday, August 27, 1975, before the Crestwood Board of Education. Contrary to the Statement of the Court of Appeals for the Sixth Circuit in the *Lake Michigan Case,* the legal and factual issues presented and decided were complex.

Various defenses for the teachers were interposed. Some teachers asserted that they did not go along with the strike, but were prevented from working by other striking teachers. Some teachers asserted that they were absent from their jobs for medical reasons. There were several other defenses. Thus, the issue before the Board was not merely whether the teachers were or were not in their classrooms, but rather whether the reasons given for not

BLEED THROUGH

being there were sufficient under the law to indicate no violation of Section 6 of PERA.

Fieger, Golden & Cousens
By: /s/ Mark H. Cousens
19390 West Ten Mile Road
Southfield, Michigan 48075
(313) 355-5555

Subscribed and sworn to before me this 30th day of October, 1975.

/s/ Katherine M. Kolomitz
Notary Public, Oakland County, Michigan
My Commission Expires: October 11, 1978.

DEC 13 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-698

LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS AND EDWARD SHAFFER, INDIVIDUALLY AND AS REPRESENTATIVE OF OTHER INDIVIDUALS SIMILARLY SITUATED AND TOO NUMEROUS TO CONVENIENTLY BE HERE SET FORTH,

Petitioners,

vs.

LAKE MICHIGAN COMMUNITY COLLEGE, A PUBLIC EDUCATION INSTITUTION ESTABLISHED UNDER THE LAWS OF THE STATE OF MICHIGAN, ET AL.,

Respondents,

and

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Intervening Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT LAKE MICHIGAN COMMUNITY COLLEGE IN OPPOSITION

THEOPHIL C. KAMMHOLZ
ROBERT C. CLAUS
PAUL F. GLEESON
THOMAS A. BAKER
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Respondents

Of Counsel:
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Rules and Statutes Involved	3
Statement of the Case	3
Argument	3
I. This Case Does Not Present a Question of General Importance for Consideration by This Court	7
II. No Case Presenting Similar Issues Is Pending Before This Court	8
III. The Decision of the Court Below Is Correct on the Merits	10
Conclusion	15
Appendix	A1

Table of Authorities

Cases

Abeyta v. Town of Taos, 499 F. 2d 323 (10th Cir., 1974) 13

Adams v. Walker, 492 F. 2d 1003 (7th Cir., 1974) 11, 13

Amezquita v. Colon, 518 F. 2d 8 (1st Cir., 1975)..... 11

Arnett v. Kennedy, 416 U. S. 134 (1974) 10, 11

Caramico v. Secretary of Housing and Urban Development, 509 F. 2d 694 (2d Cir., 1974) 12

Goss v. Lopez, 419 U. S. 565 (1975) 10

Gray v. Union County Intermediate Education District, 520 F. 2d 803 (9th Cir., 1975) 13

Hortonville Joint School District No. 1 v. Hortonville Educational Association, 66 Wis. 2d 499, 225 N. W. 2d 658, *cert granted*, No. 74-1606, 44 U. S. L. W. 3180 (1975) 8

Indiana State Employees Association, Inc. v. Boehring, 511 F. 2d 834 (7th Cir., 1975) *rev'd on other grounds* 44 U. S. L. W. 3275 (1975) 11

Lane & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387 (1923) 8

Morrissey v. Brewer, 408 U. S. 471 (1972) 13

Magnum Import Co. v. Coty, 262 U. S. 159 (1923) 8

Perry v. Sindermann, 408 U. S. 593 (1972) 10

Ring v. Schlesinger, 502 F. 2d 479, 487 (D. C. Cir., 1974) 11

Rockwell v. Crestwood School District Board of Education, 393 Mich. 616, 227 N. W. 2d 736 (1975) *U. S. App. pending* No. 75-466, 44 U. S. L. W. 3254 (1975) 6

Roth v. Board of Regents, 408 U. S. 564 (1972) 7

BLEED THROUGH

Soni v. Board of Trustees, 513 F. 2d 734 (6th Cir., 1975) 12

Suckle v. Madison General Hospital, 499 F. 2d 1364, 1366 (7th Cir., 1974) 11

T. A. Moynahan Prop., Inc. v. Lancaster Village Corp., 496 F. 2d 1114 (7th Cir., 1974) 11

United States v. Johnston, 268 U. S. 220, 227 (1925).. 8

United States v. United States Gypsum Co., 333 U. S. 364, 395 (1948) 14

Ward v. Village of Monroeville, 409 U. S. 57 (1972) .. 13

Young v. United States, 498 F. 2d 1211 (5th Cir., 1974) 11

Statutes

Michigan Public Employment Relations Act:

M. C. L. A. §§ 423.201 *et seq.*, M. S. A. § 17.455 (1) *et seq.* pp. 3, 5, 14 3

M. C. L. A. § 423.206, M. S. A. § 17.455(6), pp. 4, 6, 7, 8, 9, 10, 11, 12, 13 4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-698

LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS AND EDWARD SHAFFER, INDIVIDUALLY AND AS REPRESENTATIVE OF OTHER INDIVIDUALS SIMILARLY SITUATED AND TOO NUMEROUS TO CONVENIENTLY BE HERE SET FORTH,

Petitioners,

vs.

LAKE MICHIGAN COMMUNITY COLLEGE, A PUBLIC EDUCATION INSTITUTION ESTABLISHED UNDER THE LAWS OF THE STATE OF MICHIGAN, ET AL.,

Respondents,

and

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Intervening Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT LAKE MICHIGAN COMMUNITY COLLEGE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 518 F. 2d 1091. The opinion of the District Court is reported at 390 F. Supp. 103. Both opinions are reproduced in the Petition for a Writ of Certiorari (hereinafter, "the Petition") (Apps. C and F).[1]

1. References designated as "App. ....." are to Appendices to the Petition. References designated as "R. App. ....." are to the Appendix to this Brief.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held, on the specific facts of this case, that Petitioners did not possess a constitutionally protected property interest in continued employment with Respondent College, where the District Court found there was no contract, custom, collective understanding or tenure provision supporting that interest, and where it is undisputed that the striking teachers were not covered by state tenure or civil service statutes.

2. Whether the Court of Appeals properly held, on the specific facts of this case, that by their terminations Petitioners were not deprived of liberty, within the meaning of the Fourteenth Amendment to the United States Constitution, where the uncontradicted record evidence showed that there was no resultant opprobrium, adverse opinion or reaction against Petitioners among the community or other employers, and Respondents' action did not foreclose other public employment to Petitioners.

3. Whether the Court of Appeals properly held, assuming *arguendo* that a requisite property or liberty interest was shown, that Petitioners' right to a fair hearing would not be violated if the Respondent Board of Trustees held disciplinary hearings as mandated by a state statute, where the Michigan Employment Relations Commission, on the facts of the case, had exonerated the Respondent College of bad faith bargaining charges, and where the Court of Appeals found no record evidence of bias as to any issue to be decided by the Board of Trustees at the hearings.

BLEED THROUGH

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

The Constitutional provisions, rules and statutes involved are cited and reproduced in the Petition.

STATEMENT OF THE CASE

Respondents are Lake Michigan Community College, a public educational institution organized under the laws of the State of Michigan (hereinafter, "the College"), its President and its Board of Trustees. Petitioners are Lake Michigan College Federation of Teachers, a labor organization representing teachers employed by Respondent (hereinafter, "the Union"), and various faculty members formerly employed by the College. Collective bargaining between the Union and the College is subject to comprehensive regulation under the Michigan Public Employment Relations Act (hereinafter, "PERA"),[2] which defines unfair labor practices, provides representation and dispute settlement procedures, prohibits public employee strikes, and provides disciplinary procedures in connection therewith.

The Union and the College have had a collective bargaining relationship since 1967; the 1970-72 bargaining agreement expired in August, 1972. Although bargaining for a successor contract had commenced in February, 1972, no agreement had been reached when the 1972-73 school year opened, and as the District Court found, the faculty reported for work without either collective or individual contracts of employment (App. C, p. 64, n. 34; App. F, p. 112, 119).

Negotiations continued during the school year, utilizing both fact-finding and mediation procedures provided by PERA. On February 7, 1973, agreement was reached on all outstanding issues, including salaries. Although acceptance of the contract

2. M. C. L. A. § 423.201 *et seq.*, M. S. A. § 17.455(1) *et seq.*

was recommended by the Union leadership, it was rejected by the faculty. On February 9, 1973, the Union notified the College that it would strike if no acceptable contract were reached; and on February 15, 1973, nearly all of the faculty commenced a strike accompanied by picketing (App. F, p. 112-14).

Section 6 of PERA[3] prohibits strikes by public employees and authorizes discipline and discharge of employees who violate this prohibition, guaranteeing such disciplined or discharged employees a post-termination hearing before the employing body and judicial review thereof in the state court system. The College did not exercise its statutory right to discharge immediately, but attempted to have the faculty return to their abandoned classrooms voluntarily. When the College found itself unable to effectuate the voluntary return of the striking faculty or to hire sufficient temporary replacements to continue the students' education, it informed the striking faculty on February 27, 1973, that if they did not return to work by March 5, 1973, they would be terminated pursuant to Section 6 of PERA. At this time faculty who might have been absent from class due to reasons other than the concerted work stoppage were requested to so notify the College. On March 5, 1973, the President informed the faculty who continued to strike illegally that they were terminated, and informed them of their hearing rights under Section 6 (App. F, p. 114-15).

The striking faculty requested such hearings, which were scheduled to commence on April 9, 1973. On April 6, 1973, however, Petitioners obtained an *ex parte* temporary restraining order against the holding of these hearings; and they have been postponed pending resolution of this case (App. F, p. 115). In their Complaint, Petitioners raised three claims of constitutional deprivation: first, that the faculty was entitled to pre-termination hearings; second, that the College's Board was in fact biased against the faculty and thus could not hold the hear-

3. M. C. L. A. § 423.206, M. S. A. § 17.455(6); reproduced at page 4 of the Petition.

BLEED THROUGH

ings, despite the clear command of PERA to that effect; and third, that the procedures established by the College for the conduct of the hearings did not comport with minimal due process guarantees.

On April 30, 1973, the District Court entered a mandatory interlocutory injunction against the Respondents, ordering the immediate reinstatement of the striking faculty. That order was stayed by the United States Court of Appeals for the Sixth Circuit the next day, and was set aside by that Court as an abuse of discretion on July 9, 1973 (App. F, p. 115).

Following a hearing on the merits, the District Court entered its Opinion and Order on September 27, 1974 (Apps. C and D). The District Court made numerous findings of fact and conclusions of law, including the following: (a) the constitutionality of PERA was not at issue; (b) although the faculty had no individual or collective employment agreements, and were not covered by state tenure or civil service statutes, they did have a legitimate expectancy of continued public employment at the time of their termination because PERA prohibits termination of public employees for engaging in protected or concerted activities; (c) termination because of violation of the no-strike law *per se* infringed the faculty's liberty; (d) the faculty was not entitled to a pre-termination hearing on the facts of this case; and (e) the College, because it had bargained in bad faith with the Union, was in fact biased against the faculty, and based on the specific facts of this case could not hold the required Section 6 hearings. The District Court enjoined the holding of such hearings by the College, and directed the latter to file an action in the state court to have it decide the factual issue of whether the faculty's strike was in violation of PERA.

Prior to issuance of the District Court's Decision, the Michigan Employment Relations Commission (hereinafter, "MERC"), which administers and enforces PERA, following a full evidentiary hearing, dismissed the Union's charge that the College

had bargained in bad faith. That decision has been upheld by the Michigan Court of Appeals, ... Mich. App. ....., 231 N. W. 2d 538 (1975), and is currently before the Michigan Supreme Court on the Union's petition for leave to appeal.

The United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court on July 2, 1975, and remanded the case for dismissal of the Complaint. The Court of Appeals held that—on the specific facts of this case—the discharge of the striking faculty had not deprived them of a property interest within the meaning of the Fourteenth Amendment because the faculty's continued employment was not protected by contract, custom, collective understanding or a tenure provision, or by any applicable state statute (App. F, p. 117-19). The Court of Appeals also held—on the specific facts of this case—that the faculty had not been deprived of liberty by the discharge. The Court of Appeals rejected the District Court's apparent conclusion that termination for violation of a non-criminal no-strike law is *per se* a deprivation of liberty, noting that in this case the record evidence demonstrably established that the faculty had not suffered any public opprobrium, adverse opinion or reaction among the community, and had not been foreclosed from other public employment by the terminations (App. F, p. 122-23). As an alternate basis of its decision, assuming *arguendo* the existence of a property or liberty interest, the Court of Appeals held that, in light of the Michigan Supreme Court's construction of Section 6 of PERA in *Rockwell* v. *Crestwood School District Board of Education*, 393 Mich. 616, 227 N. W. 2d 736 (1975), *U. S. App. pending*, No. 75-466, 44 U. S. L. W. 3254 (1975), the record evidence established that the Board of Trustees harbored no bias against the striking faculty which would require that it be enjoined from conducting the Section 6 hearings (App. F, p. 123-26). The Court further noted that, inasmuch as the College's sole function in the hearings would be to determine whether a given faculty member struck, any hostility toward the Union would not manifest itself

BLEED THROUGH

in the form of an unfair decision against a non-striker, and adverted to the meaningful and substantial protection against arbitrary action in the appellate review procedures of PERA (App. F, p. 126).

Petitioners petition for reconsideration and for rehearing *en banc* by the Court of Appeals was denied on August 14, 1975. As directed by the Court of Appeals, the District Court dismissed the Complaint on September 16, 1975.

ARGUMENT

I. This Case Does Not Present a Question of General Importance Appropriate for Consideration by This Court.

The decision of the Court of Appeals on the three key issues of this case depended on record factual evidence, and this case presents no legal questions of general public importance. Thus, the Court of Appeals reviewed Petitioners' contention that the expired collective bargaining agreement and a later day-to-day understanding—terminated prior to the discharges—established a property interest, and held that "neither the bargaining agreement nor the later informal understanding conferred upon the faculty members in this case a due process property interest . . ." (App. F, p. 119). Similarly, in holding that the faculty had not been deprived of liberty, the Court of Appeals, which observed that "[e]ach case must be decided upon its own facts", reviewed the uncontradicted evidence showing that the terminations had no adverse effect on the faculty's community standing and did not foreclose their access to employment opportunities, and held that "nothing in this record" met the factual standard of this Court's decision in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972) (App. F, p. 122-23). Finally, in reversing the District Court's finding that the Board of Trustees was biased as a matter of fact, the Court reviewed all of the record evidence in light of the Michigan Supreme Court's authoritative inter-

pretation of PERA and held that ". . . there is nothing in the record to indicate that the Board will not [conduct the Section 6 hearings] fairly" (App. F, p. 126). Thus, it is apparent that this case depends on manifold factual determinations by the Courts below. Indeed, the Petition repeatedly asks this Court, in effect, to reweigh the record evidence in a manner favorable to Petitioners and reverse the Court of Appeals' factual conclusions (*e.g.*, p. 9-12, 17-21, 28-31).[4] Because this case so obviously depends on factual determinations on matters virtually unique and significant only to the parties, it is not appropriate for consideration by this Court.[5]

II. No Case Presenting Similar Issues Is Pending Before This Court.

Although certiorari has been granted in *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, 66 Wis. 2d 499, 225 N. W. 2d 658 (1975), *cert. granted*, No. 74-1606, 44 U. S. L. W. 3180, that case presents a fundamentally different question from any involved herein. The only issue presented in *Hortonville* is whether the Wisconsin Supreme Court properly held that a local school board must be presumed to be so biased against striking teachers that its decision to discharge them did not meet the constitutional requirement of impartiality. In contrast, the issue of bias in this case is, as the District Court stated, "only whether the . . . Board of Trustees is actually biased as a matter of fact under the circumstances of this case" (App. C, p. 94). Thus, the issue in this case is the weight to be accorded various facts, not, as in *Hortonville*, the propriety of a judicial assumption of bias. The broad issue of *Hortonville*, involving a sweeping constitutional presumption of bias which would apply in many situations across the nation, particularly

4. *See United States* v. *Johnston*, 268 U. S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

5. *See Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923); *Lane & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923).

BLEED THROUGH

in the absence of a comprehensive state statute regulating discipline of teachers for illegal strikes,[6] far transcends and differs significantly from the specific and factually unique questions in this case.

The only means by which a challenge based on presumed bias could have been made in this case was by attack on the constitutionality of PERA itself. This case, however, does not involve the constitutionality of PERA, its provisions authorizing discharge of strikers by the public body that engaged in collective bargaining negotiations, or its provision requiring that public body to be the decision-maker in the hearings mandated by PERA. Indeed, a three-judge district court, originally convened in this case on Respondents' motion, dissolved itself after determining that the constitutionality of PERA was not at issue herein (R. App. p. A1-A3).

The decisions of the lower courts in this case turned solely on whether specific facts showed that the Board of Trustees could perform its statutory hearing function under Section 6 of PERA without bias. Moreover, unlike *Hortonville*, this case presents no issue of bias in the initial decision to terminate the strikers. Indeed, in *Rockwell* v. *Crestwood School District Board of Education, supra,* the Michigan Supreme Court held that the employing body was not called upon in the Section 6 hearings to decide whether its decision to discharge strikers was in general justified. Rather, those hearings are limited to determining whether employees were correctly identified as strikers, with questions as to bad faith bargaining or improper discharges being left to MERC.

Further, not only is the bias issue in this case of a vastly different character from that presented in *Hortonville*, but this case presents two additional issues that must be decided differently from the Court of Appeals' decision before the issue of bias can even be reached. The issue of alleged bias is relevant in

6. Unlike Michigan, Wisconsin has no such comprehensive statute limiting the dismissal powers of the employing body and providing substantial judicial review of its decisions.

this case only if this Court holds—contrary to the Court of Appeals—that the termination of the striking faculty constituted a deprivation of property and/or liberty. Accordingly, granting certiorari in this case would not assist this Court in its resolution of the bias issue in *Hortonville* because the bias issue in this case is far narrower than and completely different from that in *Hortonville*, and because unique and complex factual issues concerning the existence of a liberty or property interest are presented herein.

III. The Decision of the Court Below Is Correct on the Merits.

In reversing the District Court, the Court of Appeals held, first, that the striking faculty had not been deprived of property or liberty within the meaning of the Fourteenth Amendment. As an alternate ground of decision, the Court assumed that the faculty possesed a protected property or liberty interest and held, contrary to the District Court, that the Board of Trustees was not precluded by bias from holding the Section 6 hearings. These holdings are correct on both the law and the facts.

The Court of Appeals' decision on the issue of protected property and liberty interests is fully in accord with this Court's decisions in *Roth* v. *Board of Regents*, *supra*, and *Perry* v. *Sindermann*, 408 U. S. 593 (1972). Those cases establish that for public employees to have an entitlement to a benefit they "must have more than a unilateral expectation of it"; instead they must "have a legitimate claim of entitlement of it" (*Roth*, *supra*, at 578). Whether a protected property interest exists is to be judged by the facts of each case because "property interests . . . are created and defined by existing rules or understandings" (*Roth*, *supra*, at 578). Similarly, whether termination deprives a public employee of liberty is a question of fact to be decided on the record in each case (*Roth*, *supra*, at 573-75).[7]

Expressly applying these principles, the Court of Appeals correctly found that Petitioners possessed no entitlement to con-

7. This Court affirmed these principles in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), and *Goss* v. *Lopez*, 419 U. S. 565 (1975).

BLEED THROUGH

tinued public employment protected by the Fourteenth Amendment. The District Court had itself found that the faculty were not covered by any individual or collective bargaining agreement or collective understanding at the time of the strike (App. C, p. 64, n. 34). Consistent with this finding, the Court of Appeals rejected Petitioners' contention that the day-to-day understanding continued in effect beyond the strike despite their material breach thereof and the College's notice of termination. The Court of Appeals found that the College had legitimately terminated this understanding in response to Petitioners' material breach of the understanding by striking (App. D, p. 119).[8]

The Court of Appeals correctly reversed the District Court's only finding supporting a property interest in Petitioners: *viz.*, that PERA itself creates such an interest. The Court of Appeals held that PERA does not create an entitlement to public employment simply because it establishes certain procedures to be followed in discharging a striking employee.[9] The statutes involved in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), and similar cases finding a statutory property right relied upon in the Petition,[10] constituted comprehensive schemes delineating the full employment rights of certain employees, while PERA is directed to one limited aspect of the employment relationship. As the Court of Appeals observed, PERA does not create anything more

8. Unlike this case, the strikers in *Hortonville* were working under individual written contracts for a given term that did not contain any provision prohibiting strikes. In further contrast to the individual contracts of the *Hortonville* strikers, the day-to-day understanding in this case was subject to termination at will by either party. *O'Connor* v. *Hayes Body Corp.*, 285 Mich. 280 (1932).

9. Other Courts of Appeals have taken this same position regarding similar statutes. *Ring* v. *Schlesinger*, 502 F. 2d 479, 487 (D. C. Cir., 1974); *Suckle* v. *Madison General Hospital*, 499 F. 2d 1364, 1366 (7th Cir., 1974). *See also, Adams* v. *Walker*, 492 F. 2d 1003 (7th Cir., 1974); *Amezquita* v. *Colon*, 518 F. 2d 8 (1st Cir., 1975).

10. *Young* v. *United States*, 498 F. 2d 1211 (5th Cir., 1974); *T. A. Moynahan Prop., Inc.* v. *Lancaster Village Corp.*, 496 F. 2d 1114 (7th Cir., 1974); *Indiana State Employees Association, Inc.* v. *Boehring*, 511 F. 2d 834 (7th Cir., 1975), *rev'd on other grounds*, 44 U. S. L. W. 3275 (1975).

in covered employees than an expectation that they will be discharged for striking. Under this Court's decisions, the test is not whether an employe's right to discharge is limited in any respect, but whether an entitlement was initially created. PERA, therefore, cannot *per se* give rise to a property interest in continued employment.

Petitioners also have sought to establish a property right by arguing that they had a legitimate expectancy of continued employment. But, as this Court held in *Roth, supra,* mere unilateral expectancy of continued employment does not rise to the level of a property interest. Moreover, Petitioners have never argued in this case that there was any extra-contractual, extra-statutory understanding that they would be entitled to employment simply by the passage of time, such as contemplated in *Perry* v. *Sindermann, supra.* Accordingly, Petitioners' citation of *Soni* v. *Board of Trustees,* 513 F. 2d 734 (6th Cir., 1975), involving a *Sindermann*-type extra-contractual, extra-statutory understanding, is inapposite.[11]

Petitioners also have argued that they possessed a contractual right to continued employment because the College was obliged to continue in effect the security of employment provision of the contract under the day-to-day understanding, notwithstanding the pre-discharge termination of that understanding. The Court of Appeals properly rejected this contention without discussion because the security of employment provision itself (App. A, p. 38) confers on the Board the unilateral right to discharge

11. Similarly, *Caramico* v. *Secretary of Housing and Urban Development,* 509 F. 2d 694 (2nd Cir., 1974), also relied upon by Petitioners, does not support Petitioners' apparent contention that merely because they may have held their positions for an extended period of time, they had a constitutionally protected property interest therein. *Caramico* involved a regulation requiring that a mortgagee seeking to recover from the Federal Housing Administration on his mortgage insurance tender possession of the property unoccupied, with certain exceptions. The Second Circuit held that tenants of such defaulting property had a constitutionally protected interest in continued occupancy "when that occupancy is not flatly prohibited by regulation" 509 F. 2d at 700. The Court thus found that the regulation itself, by virtue of the exceptions, conferred a property interest that tenants could not be deprived of without due process.

BLEED THROUGH

teachers who, like the striking faculty, fail to perform satisfactorily their teaching duties.

The Court of Appeals also correctly decided that Petitioners had not been deprived of liberty within the meaning of the Fourteenth Amendment. The Court of Appeals rejected the contention that merely because the striking faculty were terminated for violating a state law they were *per se* deprived of liberty. Not all state laws establish standards of honesty, morality or integrity. As the Court of Appeals observed, the record showed Petitioners had openly engaged in strike activities, and there was no hostile community reaction or loss of employment opportunities as a result of such activities. Noting *Roth's* holding that mere loss of position does not amount to deprivation of liberty, the Court of Appeals properly held that the record evidence belied Petitioners' claim that their termination had deprived them of liberty.[12]

The Court of Appeals also rejected the District Court's determination that the Board of Trustees was—on the facts of this case—prohibited by bias from holding the Section 6 hearings. After reviewing the findings made by the District Court supporting its determination that the Board of Trustees was biased, the Court of Appeals determined there was nothing in the record establishing that the Board would be biased in the performance of its statutory duty.[13] The District Court had

12. Other Courts of Appeals have likewise found no infringement of a protected liberty interest where the reason for termination does not constitute an allegation of a serious character defect, such as dishonesty or immorality. *See Gray* v. *Union County Intermediate Education District,* 520 F. 2d 803 (9th Cir., 1975) (incompetency, insubordination, hostility toward authority, aggressive behavior, personality differences and difficulty in getting along with others); *Abeyta* v. *Town of Taos,* 499 F. 2d 323 (10th Cir., 1974) (improper or inadequate performance of duties); *Adams* v. *Walker,* 492 F. 2d 1003 (7th Cir., 1974) (incompetence, neglect of duty and malfeasance in office).

13. *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972) and *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), relied upon by Petitioners, are inapposite. As in *Hortonville,* the issue in both those cases was whether bias could be presumed.

concluded that the Board's conduct during bargaining and the strike demonstrated hostility toward the strikers and the Union, and that it would be biased in the hearing because it would be called upon to decide the difficult legal issue of whether its own conduct justified the strike. However, in *Rockwell* v. *Crestwood School District Board of Education, supra,* the Michigan Supreme Court held that the Section 6 hearing does not encompass the issue of whether the employer's own misconduct is a defense to an illegal strike, but rather is limited solely to the question of whether "the employer correctly identified the particular employee as a violator of the act's prohibition against striking." 393 Mich. at 640-41, 227 N. W. 2d at 747. Thus, under state law, the Board's own bargaining conduct would not be at issue in the hearings, and no issue would be before the Board on which the record evidence even arguably showed Board bias. The Court of Appeals further noted that MERC, the body responsible for enforcement of PERA's unfair labor practice provisions, had determined that the College had bargained in good faith and had not committed an unfair labor practice, and that that determination had been affirmed by the Michigan Court of Appeals (App. F, p. 126). Lastly, as the Court of Appeals noted, even if the Board were hostile to the Union and the striking faculty, there would be no reason for this hostility to be vented against a faculty member who had not struck.

Contrary to Petitioners' argument, the Court of Appeals' reversal of the District Court's bias holding was clearly a proper exercise of its appellate function. As this Court has stated, clearly erroneous findings of fact must be reversed when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)), As discussed above, the Court of Appeals reviewed the entire record and concluded that there was no evidence that the Board would be biased on any issue before it. Its reversal of the District Court was thus clearly proper.

BLEED THROUGH

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THEOPHIL C. KAMMHOLZ
ROBERT C. CLAUS
PAUL F. GLEESON
THOMAS A. BAKER
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Respondents

Of Counsel:
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

Dated: December 13, 1975.

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APPENDIX

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF MICHIGAN

LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS AND EDWARD SHAFFER, Individually and as representative of other individuals similarly situated and too numerous to conveniently be here set forth, *Plaintiffs,* vs. LAKE MICHIGAN COMMUNITY COLLEGE, a Public Education Institution established under the laws of the State of Michigan, *Defendants.*	No. K49-73CA8

ORDER DISSOLVING THREE-JUDGE COURT

Plaintiffs, former teachers employed by the Lake Michigan Community College and their certified bargaining agent, Lake Michigan College Federation of Teachers, have brought this action against the college alleging that the discharge of the individual plaintiffs caused by their refusal to render services on or about February 15, 1973, was unlawful and in violation both of Michigan statutes and of the United States Constitution and seeking reinstatement. Upon notification of their discharge, the individual plaintiffs, in accordance with Michigan law, timely filed a request for review of the propriety of defendant's action,

and defendant notified them of the date set for hearing the matter. Prior to the date set for hearing, plaintiffs filed this action in which their request that the hearing be stayed pending disposition of their claim that the discharge was unlawful was granted. Defendants' motion to convene a three-judge court on the grounds that plaintiffs were seeking to enjoin the operation of a state statute on the grounds that it was repugnant to the United States Constitution was granted.

Upon considering the memoranda and oral argument which has been transcribed on the question of the propriety of convening a three-judge court and it appearing from the pleadings that this is not a case in which an injunction is sought to restain the operation of a state statute on the ground that it is repugnant to the United States Constitution but is instead an action for remedial relief for an allegedly unlawful discharge from employment, *cf. Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16 (1938); *Bistrick* v. *University of South Carolina*, 319 F. Supp. 193 (D. S. C. 1970), It Is Ordered that the three-judge court be, and it is hereby dissolved and the case is remanded to the calendar of Chief Judge Noel P. Fox.

WADE H. MCCREE, JR.,
U. S. Circuit Judge.

ALBERT J. ENGEL,
U. S. Circuit Judge.

CHIEF JUDGE NOEL P. FOX dissenting:

It appears that this case may be appropriate for a three-judge district court under 28 U. S. C. Secs. 2281 and 2284. At the time when the events giving rise to this suit occurred, the plaintiffs and defendants were involved in a serious employment dispute. All parties concede that they were subject to the Michigan Public Employees Relations Act, M. C. L. A. Sec. 423.201 *et seq.* and more particularly, Section 6 of that Act, M. C. L. A. Sec. 423.206, although it is not clear precisely how the Act applies to this case. This Act plainly embodies a state

BLEED THROUGH

policy as to the handling of strikes by public employees. The plaintiffs have sought injunctive and other relief on the grounds that the actions of the defendants were unconstitutional. If the court concludes that the actions of the defendants were unconstitutional, and grants injunctive relief, the court may be acting within the scope of 28 U. S. C. Sec. 2281. *See School District for the City of Holland* v. *Holland Education Association,* 380 Mich. 314, 157 N. W. 2d 206, 210 (1968); *Calloway* v. *Briggs,* 443 F. 2d 296 (6th Cir. 1971).

However, the matter is not in the least free from doubt. In such circumstances, considerations of judicial economy and fairness to the parties suggest that three-judges hear the case and arrive at a conclusion after hearing all the evidence and arguments. In order to avoid the possibility of a rehearing in the event of error, the district judge before whom the case would be tried if a three-judge court were not required usually adopts the opinion and order of the three-judge court as his own. In unusual circumstances, the possibility of rehearing might be avoided by declaring the suit to be a non-statutory three-judge case.

With these considerations in mind, the original three-judge panel decided, after hearing argument on the motion for a three-judge court, that the case should proceed as a three-judge court. Final decision on the three-judge court issue was to be deferred until after a hearing on the merits. Because of the real possibility that three-judge panel is required in this case, I would adhere to the original decision.

NOEL P. FOX,
Chief U. S. District Judge.

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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-698

LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD, and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD,

Petitioners,

v.

BARBARA R. HUTCHISON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CAROL A. HEWITT
c/o American Civil Liberties Union
1331 S. W. Broadway
Portland, Oregon 97201
Attorney for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-75

BLEED THROUGH

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ARGUMENT
REASONS FOR DENYING THE WRIT

I.

This question has been decided against petitioners' position by every federal appellate court considering it.

Those Circuits which have considered the question

presented have uniformly decided the question against petitioners' position.[1]

The uniform decisions by federal appellate courts on the issue raised by petitioners here refute petitioners' claim that there is "uncertainty" in the private and public sector whether under a sick leave or disability benefit plan a private or public employer discriminates by distinguishing between absences due to normal pregnancy and those attributable to disabilities unrelated to normal pregnancy.

This uniformity of decision by federal appellate courts renders review by this Court inappropriate.

II.

Decision below does not conflict with this Court's decision in Geduldig v. Aiello.

The Ninth Circuit in its decision below correctly distinguished *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), on the basis that the instant case involves statutory interpretation rather than constitutional analysis. In *Geduldig* the Court considered whether a classification based upon pregnancy violated the Equal Pro-

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[1] *American Telephone & Telegraph Co.* v. *Communications Workers of America*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S., June 19, 1975) (No. 75-1601); *Farkas* v. *South Western City School District*, 8 F.E.P. Cases 288 (S.D. Ohio 1974), *aff'd.* by Sixth Circuit Court of Appeals on October 24, 1974, (No. 74-1649); *General Electric Co.* v. *Gilbert* and *Gilbert* v. *General Electric Co.*, 44 U.S.L.W. 2013 (4th Cir. 1975), *cert. granted*, October 6, 1975 (U.S. Nos. 74-1589, 74-1590); *Liberty Mutual Ins. Co.* v. *Wetzel*, 511 F.2d 199 (3d Cir. 1975), *cert. granted* May 27, 1975 (U.S. No. 74-1245, 43 U.S.L.W. 3621).

BLEED THROUGH

tection Clause of the Fourteenth Amendment. Title VII was not at issue.

The broad language of Title VII, unlike the Equal Protection Clause, proscribes classifications which "in any way would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status. . . ." 42 U.S.C. § 2000e-2(a)(2). As the Ninth Circuit correctly pointed out in the decision below, the language of Title VII is conducive to an interpretation different from that given the Equal Protection Clause.

Because the Ninth Circuit decision in this case does not conflict with the Court's opinion in *Geduldig*, certiorari should be denied.

III.

Cases raising identical issues are pending before this Court.

As the petitioners correctly point out, this case arises in the same context and presents the same basic issues as *Liberty Mutual Ins. Co.* v. *Wetzel*[2] and *General Electric Co.* v. *Gilbert* and *Gilbert* v. *General Electric Co.*[3] Although the question presented is one of fundamental importance in the administration of Title VII, the Court has previously granted certiorari in *Liberty Mutual* and *General Electric*. Therefore, certiorari should be denied or consideration of the

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[2] 511 F.2d 199 (3d Cir. 1975), *cert. granted* May 27, 1975 (U.S. No. 74-1245), 43 U.S.L.W. 3621.

[3] 44 U.S.L.W. 2013 (4th Cir. 1975), *cert. granted* October 6, 1975 (U.S. Nos. 74-1589 and 74-1590).

Petition should be deferred until a decision is reached by the Court in the pending cases.

Additional argument on the question presented is unnecessary and would unduly burden this Court. For this reason, certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CAROL A. HEWITT
c/o American Civil Liberties
Union of Oregon
1331 S. W. Broadway
Portland, Oregon 97201
Attorney for Respondent

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